IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 15 1989

Jack C. [illegible]
U.S. DISTRICT COURT

LOCAL AMERICA BANK OF TULSA,
a federal savings bank,

Plaintiff,

vs.

GEORGE A. SHIPMAN, et al.,

Defendants.

Case No. 88-C-1331-E

**ORDER DISCHARGING RECEIVER,
CANCELLING AND EXONERATING SURETY BOND
AND DIRECTING DISTRIBUTION OF FUNDS TO PLAINTIFF**

NOW on this 16th day of June, 1989, upon the application of the receiver herein for discharge and cancellation and exoneration of his surety bond, and the motion of the Plaintiff for an Order directing the receiver to distribute net receivership funds to the Plaintiff, the Court, for good cause shown, FINDS that the receiver should be discharged, the receiver's bond should be cancelled and exonerated, and the receiver should be directed to distribute all funds in his possession to the Plaintiff herein, for application against the Plaintiff's claims against the bankruptcy estates of George A. Shipman and Clara J. Shipman, and Diversified Resources Corporation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the receiver should be and is hereby discharged from his fiduciary duties in this proceeding, that the receiver's bond filed herein be cancelled and exonerated effective as of the date of this

Order, and that all funds held by the receiver be distributed to Plaintiff in reduction of its claims against the bankruptcy estates of George A. Shipman and Clara J. Shipman, and Diversified Resources Corporation.

/s/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:

JONES, GIVENS, GOTCHER, BOGAN & HILBORNE
a professional corporation

By: _____
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ATTORNEY FOR MARY THETFORD, TRUSTEE OF THE BANKRUPTCY ESTATE OF DIVERSIFIED RESOURCES CORPORATION

_____
JUDI BEAUMONT, Trustee of the bankruptcy estate of George A. Shipman and Clara J. Shipman, pro se

ELLER AND DETRICH
a professional corporation

By: _____
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ATTORNEYS FOR FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR TWIN CITY SAVINGS, FSA

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ATTORNEYS FOR FSLIC AS RECEIVER FOR FIRST OKLAHOMA SAVINGS BANK

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ATTORNEYS FOR FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR TWIN CITY SAVINGS, FSA

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ATTORNEYS FOR FSLIC AS RECEIVER FOR FIRST OKLAHOMA SAVINGS BANK

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LADONNA SHAUGHNESSY,

Plaintiff,

vs.

HILLCREST MEDICAL CENTER, INC., and KIM ELLIOTT,

Defendants.

No. 89-C-344-C

ORDER

Now before the Court for its consideration is the motion of defendant Hillcrest Medical Center, Inc. (Hillcrest) to dismiss plaintiff's fourth cause of action, and the application of plaintiffs for certification.

Plaintiff asserts four claims: (1) an action under Title VII of the Civil Rights Act of 1964 for sexual harassment; (2) intentional infliction of emotional distress; (3) retaliation for asserting her rights under Title VII; (4) wrongful discharge in violation of public policy.

Hillcrest moves to dismiss the fourth cause of action on the ground that such a claim is preempted by existing remedies. It is clear that plaintiff asserts that the public policy violated is that reflected in the statutes upon which she bases her other causes of action. Hillcrest contends that the public policy exception to the employment-at-will rule recognized in Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989), applies narrowly to provide

a plaintiff with a remedy where none exists. Plaintiff initially responded to the motion to dismiss on the merits. After defendants submitted a copy of this Court's Order in another case, finding that an existing remedy preempted a Burk action, plaintiff filed an application to certify the question to the Supreme Court of Oklahoma.

The Court has reviewed the issue and believes that the proper ruling is that a Burk action is precluded under these facts. See Allen v. Safeway Stores, Inc., 699 P.2d 277, 284 (Wyo. 1985). See also Wehr v. Burroughs Corp., 438 F.Supp. 1052, 1055 (E.D.Pa. 1977). As for certification, such a decision is discretionary with this Court, and certification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law. Armijo v. Ex Cam, Inc., 843 F.2d 406, 407 (10th Cir. 1988). The Court has concluded that the issue need not and will not be certified.

It is the Order of the Court that the motion of defendant Hillcrest Medical Center, Inc. to dismiss plaintiff's fourth cause of action is hereby GRANTED.

It is the further Order of the Court that the application of the plaintiff for certification is hereby DENIED.

IT IS SO ORDERED this 15th day of August, 1989.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 15 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN RE:

REPUBLIC TRUST & SAVINGS CO., No. 84-01461-W (Chapter 11)

Debtor.

ROBERT R. SAMS,

Appellant,

vs. No. 88-C-409-E

R. DOBIE LANGENKAMP, Successor Trustee for Republic Trust & Savings Company,

Appellee.

O R D E R

Robert R. Sams, Appellant (Sams) brings this appeal, arguing that the Bankruptcy Court erred in denying his motion to lift automatic stay.

On September 2, 1986, Debtor, through its Successor Trustee (the Estate), filed a petition in the District Court of Tulsa County, State of Oklahoma against Robert Sams for collection of three notes.[1] Sams filed his Answer and Counterclaim, wherein he pled various affirmative defenses and a counterclaim, including setoff. The state district court raised the question whether Sams could plead a setoff without having first obtained leave of the

[1] First Oklahoma Savings Bank, F.A., Attorney-in-Fact for R. Dobie Langenkamp, Successor Trustee for Republic Trust & Savings Company, Plaintiff, v. Robert R. Sams, Defendant, Case No. CJ-86-5598.

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Bankruptcy Court and before having the issue resolved in that forum. The Court directed Sams to seek permission of the Bankruptcy Court before proceeding with his setoff. Thereafter, Sams filed his Motion for Order Modifying Stay. Following a hearing on Sams' motion and the Estate's objection, the Bankruptcy Court denied Sams' motion. Sams then moved the Court to reconsider, and the Court denied reconsideration. Sams filed his Notice of Intent to Appeal and this matter is now before the Court after an advisory hearing before a Magistrate.

The sole issue for consideration is whether the Bankruptcy Court properly denied Sams' Motion for Order Modifying Stay, thereby denying him the right to assert his setoff against the Debtor in the state court action.

The automatic stay provisions of the Bankruptcy Code are found at 11 U.S.C. §362 and provide, in pertinent part:

> (a) Except as provided [elsewhere in the Code], a petition filed under §§301 [voluntary petition], 302 or 303 of this Title ... operates as a stay, applicable to all entities, of --
>
> (1) the commencement or continuation including the issuance or employment of process of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this Title, or to recover a claim against a debtor that arose before the commencement of this case under this Title;
>
> ...
>
> (7) the setoff of any debt owing to

> the debtor that arose before the commencement of the case under this Title against any claim against the debtor.

The automatic stay prohibits the assertion of setoff rights unless a modification, or a "lifting", of the stay can be obtained from the Bankruptcy Court.

The decision whether to modify or "lift" the automatic stay is committed to the discretion of the Bankruptcy Court and will not be disturbed on appeal unless the Court abused its discretion in reaching the decision. Pursifull v. Eakin, 814 F.2d 1501 (10th Cir. 1987).

In this case the Bankruptcy Court declined to lift the stay to permit Sams to assert a setoff against the Estate's claims against him, stating,

> [I]n a case of this size the costs of litigation, especially from the acts and activities of the debtor, are nation-wide and would cause all of the assets to be eaten up, consumed by defense litigation in the discharge of the Trustee's duty of collecting assets and reducing the same to money.

(Transcript of Hearing of April 14, 1988, p. 6)(Tr.). The Court implied that given these facts, modification of the stay would contravene the fundamental purpose of the Bankruptcy Code to equitably rearrange the affairs of the debtor. (Tr. 6).

Also before the Bankruptcy Court were the following facts concerning the state court litigation. The Estate was pursuing three causes of action in Sams in state court to collect on three promissory notes allegedly in default. Out of the three causes of

action asserted by the Estate, Sams' affirmative defense, counterclaim, and setoff related only to the third cause of action, and were all based on the same alleged facts. Sams did not contest the first two. Collateral to secure the first note, a yacht, already had been sold and its proceeds were being held, under court order, subject to being disbursed to the Estate. Sams objected to the disbursement until the adjudication of his counterclaim and setoff on the third note. There were thus proceeds available to the Estate that were largely undisputed.

The purpose of the stay provision is to protect the debtor, as well as its creditors, by ensuring an orderly resolution of all claims. Pursifull, 814 F.2d at 1504. The determination whether to modify the stay depends upon the facts and equities of each case. E.g., In re Bacigalupi, Inc., 60 B.R. 442, 445 (9th Cir. Banktcy.App. Panel 1986); In re Bohack Corp., 599 F.2d 1160 (2d Cir. 1979). In light of the purpose of the stay, the nature of the Republic Trust bankruptcy, and the facts regarding the state court action, this Court must conclude that the Bankruptcy Court did not abuse its discretion in denying Sams' motion to lift the automatic stay.

IT IS THEREFORE ORDERED that the order of the Bankruptcy Court denying the motion of Robert R. Sams is AFFIRMED.

ORDERED this 15th day of August, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 15 1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

STEVEN LEROY DELONEY,

Plaintiff,

vs.

THE DISTRICT COURT OF TULSA COUNTY, STATE OF OKLAHOMA,

Defendant.

No. 88-C-581-E

O R D E R

The Court has for consideration the Report and Recommendation of the Magistrate filed June 28, 1989. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 is denied and Respondents' Motion to Dismiss is granted.

ORDERED this 15th day of July, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MOTOR CARRIER AUDIT AND COLLECTION CO.,

Plaintiff,

vs.

ZIDELL EXPLORATIONS,

Defendant.

Case No. 87-C-52-E

JOURNAL ENTRY OF JUDGMENT

NOW, on the 29th day of June, 1989, there came on for consideration by the Court the Motion of Defendant, Zidell Explorations, to adopt the decision of the Interstate Commerce Commission pursuant to the provisions of 28 U.S.C. §1336(b), which decision of the Interstate Commerce Commission was rendered in February, 1989, the Plaintiff appearing by and through its counsel, Joe Fears, and the Defendant, appearing by and through its counsel, James P. McCann. The Court, after reviewing the Briefs submitted by the parties, including all evidentiary materials submitted to the Interstate Commerce Commission, appended thereto, as well as argument of counsel, found that the Motion of Zidell Explorations to Adopt and Enforce the Decision of the Interstate Commerce Commission should be granted, pursuant to its Order filed July 27, 1989, which Order is expressly incorporated herein by reference.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the decision of the Interstate Commerce Commission, filed on February 16, 1989, be and is hereby adopted by this Court, pursuant to the provision of 28 U.S.C. §1336(b) and is to be enforced as hereinafter set forth.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, having fully paid the freight rate negotiated with the Plaintiff's predecessor-in-interest, not be required to pay any additional sums for freight charges.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff have and recover nothing by virtue of its Complaint filed in this case and that judgment be, therefore, entered accordingly for the Defendant, Zidell Explorations, decreeing that no sums are owing by said Defendant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant be entitled to recover its costs and, upon proper application to the Court following the filing of this Journal Entry of Judgment, said Defendant may file an application with the Court for the award of its attorney's fees, in the event the

Court determines that the Defendant is entitled to such fees.

Entered this 15 day of Aug, 1989.

/s/ JAMES O. ELLISON

James O. Ellison
Judge of the District Court

APPROVED AS TO FORM:

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Attorneys for Zidell Explorations

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SASSY, INC., an Illinois corporation Plaintiff, v. BABY CARE, INC., an Oklahoma corporation, Defendant.	Civil Action No. 88-C-1431-E Judge James O. Ellison Settlement Judge Magistrate John Leo Wagner

STIPULATED FINAL DECREE BY CONSENT

Plaintiff, SASSY, INC. (hereinafter sometimes referred to as "Plaintiff") having filed its COMPLAINT alleging various acts of trademark infringement and unfair competition relative to the accused designation "INFA-GRIP," as appears more fully by the three counts of said Complaint and the prayer for relief contained therein; against Defendant, BABY CARE, INC. (hereinafter sometimes referred to as "Defendant"); and Plaintiff and Defendant having agreed on an amicable basis for resolution of the above controversy, without trial and without adjudication of the issues of fact and conclusions of law manifested by said controversy; through stipulated entry of the present STIPULATED FINAL DECREE BY CONSENT.

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiff and Defendant in the above-captioned litigation acknowledge, by execution of this STIPULATED FINAL

DECREE BY CONSENT, this Court's jurisdiction over the subject matter of and the parties to the present litigation, as well as acknowledge this Court's continuing jurisdiction over the enforcement of this STIPULATED FINAL DECREE BY CONSENT.

2. Defendant shall use its reasonable best efforts in attempting to completely discontinue all further use of the accused mark "INFA-GRIP," and all variations thereof on or by December 30, 1989; and shall be and, as of March 30, 1990, is permanently enjoined from using upon or in connection with the sale, advertising, marketing, promotion and/or distribution of any of its products, and particularly its baby food containment and feeding apparatus products and/or associated services, anywhere in the world, the term, designation and/or notation "INFA" or any notation, words, symbols or combinations thereof embodying the term "INFA," including the accused "INFA-GRIP" designation, as well as any other marks which are potentially confusingly similar in appearance and/or sound to any said "INFA" designations of Plaintiff, Defendant being permitted to phase out use of said accused designation and/or similar terms by no later than said March 30, 1990 date. In association with the obligations and injunction of this paragraph, Plaintiff acknowledges that the designation "INFANT-GRIP" neither infringes nor is confusingly similar to any of Plaintiff's "INFA" trademarks and/or service marks, to the extent that the designation "INFANT-GRIP" is adoptable and usable by Defendant in association with such products without violation of said injunction and without further contest

or accusation by Plaintiff.

3. Defendant, on or by March 30, 1990, (i) shall alter, excise or obliterate all reference to any "INFA" marks (including the "INFA-GRIP" designation) from its price lists and (ii) shall destroy all remaining products, molds, wrapping materials, containers, labels, boxes, manuals, catalogs, brochures, business cards, stationery, and all other materials and things utilized with or relating directly and/or indirectly to the sale, advertising, marketing, promotion, and/or distribution of Defendant's products, within its possession, custody and/or control, which bear either the accused mark "INFA-GRIP" or otherwise bear any portions of any of Plaintiff's "INFA" trademarks and/or service marks, or any notation, words, symbols or combinations thereof potentially confusingly similar in appearance and/or sound to any said "INFA" designations of Plaintiff, with certification of the things, volumes and acts taken to affectuate such alteration, excision, obliteration and/or destruction.

4. Defendant shall relinquish and expressly abandon any and all Federal and/or state trademark or service mark registrations and/or applications relating in any way to the accused mark "INFA-GRIP" or any notation, words or symbols or combinations thereof which are potentially confusingly similar in appearance and/or sound to any of said "INFA" designations of Plaintiff, and Defendant shall refrain from applying for Federal and/or state registrations of any mark bearing, in whole or in

part, any of Plaintiff's "INFA" designations, or any notation, words or symbols potentially confusingly similar in appearance and/or sound thereto, in association with Defendant's products and/or services. With particular regard to the abandonment of U.S. Trademark Reg. No. 1,492,111, which Defendant acknowledges is deemed required under the terms of this paragraph, among other things, Defendant shall prepare an express abandonment of same in accordance with the provisions of Title 37 of the Code of Federal Regulations, for the express purpose of purging said registration from the Principal Register of the United States Patent and Trademark Office and provide an acceptable original and two copies of same, executed by a duly empowered officer of Defendant, to Plaintiff's counsel, in escrow, for Plaintiff's transmittal of same to the United States Patent and Trademark Office upon entry of dismissal of the present action.

5. Upon entry of this STIPULATED FINAL DECREE BY CONSENT and dismissal of the present action as prescribed hereinbelow, Plaintiff shall remit unto Defendant the sum of $3,000 (THREE THOUSAND DOLLARS), as a contribution towards Defendant's tooling change costs towards Defendant's further compliance with paragraphs 2 and 3 hereinabove. Said $3,000 amount shall be remitted to Defendant's counsel for maintenance by him, in escrow, until such time as entry of this Order and dismissal occurs, after which time Defendant may endorse and cash said tooling change contribution.

6. Plaintiff agrees to refrain from using the term "GRIP" in whole or in part as any of its trademarks and/or service marks, but reserves its right to use said term in a descriptive and/or explanatory context.

7. In acknowledging that the proposed mark "INFANT-GRIP," as described hereinabove, neither infringes nor is likely to cause confusion relative to any of Plaintiff's "INFA" designations, Plaintiff agrees to supply to Defendant, if requested, an express acknowledgement of such non-infringement and non-confusion solely for the purpose of assisting Defendant in obtaining federal registration of the mark "INFANT-GRIP" before the United States Patent and Trademark Office; at Defendant's expense.

8. Except to the extent that this STIPULATED FINAL DECREE BY CONSENT establishes particular rights and obligations, each of the parties does hereby fully, finally and forever release, remise, discharge and acquit the other, together with its heirs, successors, assigns, representatives, shareholders, directors, officers, employees, agents and attorneys, of and from any and all claims, demands, sums of money, acquisitions, rights, causes of action, obligations and liabilities of every kind or nature which it presently now has, ever had, claimed to have had, or hereinafter may have or claim to have against said other party, arising at any time in the unlimited past up to and including the date of entry of this STIPULATED FINAL DECREE BY CONSENT, which arise out of or relate to or are connected with

the claims, allegations or defenses set forth in the above-captioned litigation.

9. The rights, benefits and obligations hereunder this STIPULATED FINAL DECREE BY CONSENT shall inure respectively to the parties hereto as well as to their respective representatives, successors and assigns, and shall be binding upon each of said parties hereto as well as their respective representatives, successors and assigns.

10. Each of the parties agrees to maintain the terms of this STIPULATED FINAL DECREE BY CONSENT in strict confidence, agreeing to refrain from publicizing any of the terms thereof--with the understanding and desire that this consent decree will be entered and maintained by the Court under seal. Upon inquiry from any entity as to the status of the above mentioned controversy, the parties may only acknowledge that the matter has been amicably settled or resolved between the parties. The present prohibition against disclosure of the terms of this Consent Decree shall not apply to the disclosure of such terms in confidence, to an accounting, financial or lending entity of such respective party--which recipient shall be informed, prior to disclosure, that any such terms disclosed are to be maintained by said entity in confidence.

IT IS FURTHER ORDERED:

That all other matters relating to the above-captioned controversy are to be and are hereby dismissed with prejudice,

with each party bearing its own costs and attorney's fees, in view of this STIPULATED FINAL DECREE BY CONSENT.

Entered this 15th day of August, 1989.

JAMES O. ELLISON

United States District Judge

Approved on Behalf of Plaintiff

LAW OFFICES OF DICK AND HARRIS

By: Richard D. Harris

Richard D. Harris

Dated: 7-17-89

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Chicago, Illinois 60606
(312) 726-4000

Gable & Gotwals
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Tulsa, Oklahoma 74119-1217
(918) 582-9201

Plaintiff, SASSY, INC.

By: F. S. Hirsch, Jr.

Fritz S. Hirsch, Jr.
President

Dated: 6-30-89

Approved on Behalf of Defendant

LAW OFFICES OF MARK G. KACHIGIAN

By: Mark G. Kachigian

Mark G. Kachigian

Dated: 8/3/89

Law Offices of Mark G. Kachigian
522 South Boston
Tulsa, Oklahoma 74103
(918) 584-4600

Defendant, BABY CARE, INC.

By: M. C. Barber

Michael Barber
President

Dated: 7/18/89

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES BRAZEAL,

Plaintiff,

vs.

J. H. MARTIN, individually, and as a police officer, Tulsa, Oklahoma; CITY OF TULSA,

Defendants.

No. 87-C-533-C

ORDER

Now before the Court for its consideration is the application of defendant City of Tulsa for attorney fees.

On October 5, 1988, defendants filed an offer of judgment pursuant to Rule 68 F.R.Cv.P., offering to allow judgment to be taken against the City in the amount of $100,000 as settlement as to both defendants. The plaintiff did not accept the offer. Subsequently, plaintiff and defendant Martin settled as to claims against Martin for $100,000. On April 18, 1989, the Court entered summary judgment in favor of the City and against plaintiff. The City now seeks attorney fees for time expended after April 10, 1989.

The critical sentence of Rule 68, in this instance, provides that "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." First, it is unclear why the City

only seeks fees for April, as the offer was made in October. In any event, the City's position is not well taken. Costs are shifted to plaintiff only when he obtains a judgment which is not more favorable than the offer. The judgment in this case was entered in favor of the City. Rule 68 does not shift costs to a plaintiff against whom judgment has been entered. Lewis v. Safeway Stores, Inc., 671 F.Supp. 361, 363 (D.Md. 1987). Further, a prevailing civil rights defendant may not be awarded attorney fees under 42 U.S.C. §1988 unless the trial court determines plaintiff's action to be "frivolous, unreasonable, or without foundation." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). The Court finds that plaintiff's action herein does not meet the Christianburg standard. Thus, defendant is not entitled to fees. The Court will not interpret Rule 68 to circumvent established interpretation of Section 1988. Cf. Crossman v. Marcoccio, 806 F.2d 329 (1st Cir. 1986).

It is the Order of the Court that the application of defendant City of Tulsa for attorney fees is hereby DENIED.

IT IS SO ORDERED this 17th day of August, 1989.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT RANDALL ZEIGLER,)
)
Plaintiff,)
) No. 83-C-248-C
vs.)
)
RON CHAMPION,)
)
Defendant.)

8-14-89

ORDER

Now before the Court for its consideration is the objection of plaintiff to the Report and Recommendation of the United States Magistrate filed on May 30, 1989.

The Magistrate made a thorough analysis of all seven grounds raised by plaintiff in his habeas corpus petition and found that the petition should be denied.

The Court has independently reviewed the record and finds that the Report and Recommendation is supported by applicable law, and should be affirmed.

It is the Order of the Court that the plaintiff's petition for habeas corpus relief is hereby DENIED.

IT IS SO ORDERED this 14th day of August, 1989.

H. DALE COOK
Chief Judge, U. S. District Court

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES BRAZEAL,

Plaintiff,

vs.

J. H. MARTIN, individually, and as a police officer, Tulsa, Oklahoma; CITY OF TULSA,

Defendants.

No. 87-C-533-C

ORDER

Now before the Court for its consideration is the motion of plaintiff to vacate and/or to reconsider summary judgment.

On April 18, 1989, the Court entered summary judgment in favor of defendant City of Tulsa (the City) as to plaintiff's claim under 42 U.S.C. §1983. Plaintiff alleges that defendant Martin, a police officer employed by the City, stopped plaintiff's car, arrested and handcuffed plaintiff, and in the process seriously injured plaintiff.

In its previous Order, the Court found that plaintiff had failed to establish a genuine issue of material fact as to the existence of a municipal custom, and also noted that the mere act of handcuffing could not have caused plaintiff's alleged injuries. Plaintiff asks the Court to reconsider both conclusions.

As to the existence of custom, plaintiff relies solely on the testimony of defendant Martin, who stated in deposition that the

City has customs (1) of having police officers handcuff all arrested persons,and (2) of allowing officers discretion in arresting traffic violators. Martin states that such customs are inculcated in the training of Tulsa Police officers. The Court previously concluded, and hereby reaffirms, that the conclusory testimony of Martin is insufficient to raise a question of fact. Martin testified to no other incidents involving himself or other Tulsa police officers. No training manuals, instructor testimony, or testimony of other officers was adduced to establish the asserted customs. No evidence is present in the record of a "widespread practice" of an unconstitutional nature.

As to the causation issue, plaintiff urges that "[t]he Court must not be misguided by an incorrect assumption that plaintiff's injuries were caused by excessive force of Officer Martin, independent of any custom of the City of Tulsa. This is not a police brutality case." (April 28, 1989 Brief at 3-4). This statement is remarkable, in view of the language of the Amended Complaint, filed June 17, 1988, which alleges "excessive and unjustified force" and "brutality" on Martin's part, resulting in dislocated shoulders and other injuries of plaintiff. In his present brief, plaintiff argues that because of his age (70) and pre-existing conditions (thoracic outlet syndrome, which condition plaintiff does not bother to define for the Court), the mere act of handcuffing did cause certain injuries. Because of plaintiff's age and his "genetic predisposition for inflammatory arthritis", he argues, ordinary handcuffing <u>becomes</u> excessive force in this

instance. Plaintiff does not suggest an arbitrary age limit below which police officers are free to handcuff those arrested. Nor has he cited any authority for the proposition that a plaintiff's pre-existing condition transforms ordinary force into excessive force. There is an insufficient showing that a custom of handcuffing all arrested persons exists in Tulsa and, if it did, that it constitutes the use of excessive force. Similarly, there has been no showing that a custom of allowing officers discretion in arresting traffic violators exists or caused plaintiff's injuries. The Court is not persuaded that its Order of April 18, 1989, was erroneous.

It is the Order of the Court that the motion of plaintiff to vacate and/or to reconsider summary judgment is hereby DENIED.

IT IS SO ORDERED this 14th day of August, 1989.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANLE BRUCE MURRAY and
MYRNA K. MURRAY,

Plaintiffs,

vs.

HOME OWNERS WARRANTY
CORPORATION and CIGNA
PROPERTY AND CASUALTY
COMPANIES,

Defendants.

No. 88-C-1624 C ✓

O R D E R

This matter comes on for hearing pursuant to the Joint Stipulation for Order of Dismissal against CIGNA Insurance Company. The Court finds the stipulation should be approval and dismissal so ordered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint filed by the plaintiffs is dismissed with prejudice as to CIGNA Insurance Company without costs being taxed against either party.

JUDGE OF THE DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

AUG 14 1989

ROBERT RANDALL ZEIGLER,

Plaintiff,

vs.

RON CHAMPION,

Defendant.

No. 83-C-248-C

ORDER

Now before the Court for its consideration is the objection of plaintiff to the Report and Recommendation of the United States Magistrate filed on May 30, 1989.

The Magistrate made a thorough analysis of all seven grounds raised by plaintiff in his habeas corpus petition and found that the petition should be denied.

The Court has independently reviewed the record and finds that the Report and Recommendation is supported by applicable law, and should be affirmed.

It is the Order of the Court that the plaintiff's petition for habeas corpus relief is hereby DENIED.

IT IS SO ORDERED this 14th day of August, 1989.

H. DALE COOK
Chief Judge, U. S. District Court

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FERNAND PAYETTE,

Plaintiff,

vs. No. 89-C-508-C

THE TULSA CLUB and KEVIN O'DONNELL,

Defendants.

ORDER

Now before the Court for its consideration is the motion of defendants to dismiss plaintiff's first, second and third causes of action. Defendants have filed an answer to plaintiff's fourth cause of action.

Defendants make the identical argument as to the first two causes of action and therefore they shall be considered together. Both count 1 and count 2 are supplied by plaintiff with a heading: "Termination of Employment in Violation of Public Policy." The body of each count then pleads discharge in violation of a specific statutory provision (25 O.S. §1601(1) and 29 U.S.C. §215(a)(3) respectively). No explicit reference to public policy appears in the body of either count. Both counts request actual damages (including "mental anguish") and punitive damages.

Defendants contend that plaintiff is alleging violations of the public policy exception to the employment-at-will rule recognized in Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). They assert that the claims should be dismissed because, as the reference to statutes within the counts indicates, there is an existing remedy for each of these causes of action, and plaintiff must resort to that remedy.

Plaintiff's response is woefully inadequate and -- it almost seems deliberately -- cryptic. He says that "[w]hether Burk applies to this case or not, Burk is not a ground for dismissing" the first two causes of action, and that the amount of damages recoverable is an issue to be resolved at time of trial. The Court is left in the dark as to what causes of action plaintiff perceives himself to be asserting. He has coupled a "public policy" heading and a prayer for punitive damages with specific references to statutes providing a remedy for improper discharge. The Court agrees with defendants that an existing statutory remedy precludes access to the Burk exception. See Allen v. Safeway Stores, Inc., 699 P.2d 277, 284 (Wyo. 1985). However, Rule 8(f) F.R.Cv.P. places a mandate on this Court to construe pleadings so as to do substantial justice. Therefore, the Court will sustain the motion to the extent that the prayers for punitive damages are hereby stricken. The Court rules that the first two causes of action, viewed as alleging violations of the statutes recited therein, survive a motion to dismiss. If additional grounds to dismiss these two causes of action exist, or if certain requested actual

damages are inappropriate, defendants may review their motion within an appropriate time or file answers to counts 1 and 2, as they see fit.

For his third cause of action, plaintiff avers that he was an employee terminable at will, but that he was "promised assurances of continued employment" and in fact was assured that he was to be the executive chef at the Tulsa Club through his retirement. Further, he was assured that an employment agreement would be consummated within the two weeks following April 3, 1989.

Under Oklahoma law, a contract of employment which is for an indefinite period is terminable at will by either party. Freeman v. Chicago, R.I. & P.R. Co., 239 F.Supp. 661 (W.D.Okla. 1965). Plaintiff has shown no additional consideration beyond his services. A subjective expectation does not create an enforceable contract right. Torsky v. Avon Products, Inc., 707 F.Supp. 942, 944 (W.D.Mich. 1988). There has also been no showing that any oral contract falls outside the Statute of Frauds. See Dicks v. Clarence L. Boyd Co., 238 P.2d 315 (Okla. 1951). The plaintiff's third cause of action fails.

It is the Order of the Court that the motion of defendant to dismiss is hereby granted in part as to the first two causes of action in that the prayers for punitive damages are hereby stricken. The motion is denied in that the Court construes the first two causes of action to facially state claims under 25 O.S. §1601(1) and 29 U.S.C. §215(a)(3).

It is the further Order of the Court that the motion of the defendants to dismiss is hereby granted as to the plaintiff's third cause of action.

IT IS SO ORDERED this 14th day of August, 1989.

H. DALE COOK
Chief Judge, U. S. District Court

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MICHAEL J. KELLY,)
)
Defendant.) CIVIL ACTION NO. 89-C-393-C

DEFAULT JUDGMENT

This matter comes on for consideration this 10 day of Aug, 1989, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Catherine J. Depew, Assistant United States Attorney, and the Defendant, Michael J. Kelly, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Michael J. Kelly, acknowledged receipt of Summons and Complaint on May 26, 1989. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant,

Michael J. Kelly, for the principal amount of $20,000.00, plus costs of this action.

(Signed) H. Dale [illegible]

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
NANCY L. KELLY,)
)
Defendant.) CIVIL ACTION NO. 89-C-394-C

DEFAULT JUDGMENT

This matter comes on for consideration this 10 day of Aug, 1989, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Catherine J. Depew, Assistant United States Attorney, and the Defendant, Nancy L. Kelly, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Nancy L. Kelly, acknowledged receipt of Summons and Complaint on May 26, 1989. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant,

Nancy L. Kelly, for the principal amount of $2,000.00, plus costs of this action.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PROSPECTIVE INVESTMENT AND TRADING COMPANY, LTD., an Oklahoma corporation; PROSPECTIVE GROUP 1981-III LTD., a Louisiana partnership in Commendam, and H. C. HICKMAN,

Plaintiffs,

vs.

PRODUCER'S GAS COMPANY, a Texas corporation,

Defendant.

Case No. 86-C-986 C

O R D E R

On this 10 day of August, 1989, pursuant to the Stipulation of Dismissal With Prejudice filed by the parties, it is hereby ORDERED, ADJUDGED AND DECREED that all claims filed in this case by Plaintiff are hereby dismissed with prejudice. All parties shall bear their own costs and attorneys' fees.

(Signed) H. Dale Cook

H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

COMFORT, LIPE & GREEN

By Richard A. Paschal

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Attorneys for Plaintiffs

FILED

AUG 11 1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOMART DEVELOPMENT CO.,

Plaintiff,

vs.

THE OWL'S NEST, INC., d/b/a Kristi's Gifts,

Defendant.

Case No. 89-C-459-E

JUDGMENT

In keeping with the Entry of Default filed on the 1st day of August, 1989, in this matter, judgment is hereby entered in favor of HOMART DEVELOPMENT CO., and against THE OWL'S NEST, INC., d/b/a Kristi's Gifts in the amount of ONE HUNDRED SEVENTY-NINE THOUSAND, TWO HUNDRED TWENTY-FIVE DOLLARS AND 59/100 DOLLARS ($179,225.59) with post-judgment interest at the rate of 7.75% from this date until paid. Attorney fees will be considered upon proper application under Local Rule 6(G).

DATED this 10th day of August, 1989.

S/ JAMES O. ELLISON

United States District Judge

APPROVED AS TO FORM:

John J. Livingston OBA #5477
Attorney for Plaintiff

Homart.P07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANDERMAN & CO.; DONA M. MOHAN; ST. MARY PARISH LAND COMPANY; KENT J. HARRELL d/b/a HARRELL ENERGY CO.; RALPH H. SMITH; JAMES C. HUNT, JR.; GEORGE G. ANDERMAN; and ANDERMAN/SMITH OPERATING COMPANY,	)	
Plaintiffs,	)	
v.	)	Case No. 88-C-1483E
MESA OPERATING LIMITED PARTNERSHIP, a Delaware limited partnership,	)	
Defendant.	)	

ADMINISTRATIVE CLOSING ORDER

Upon the joint application of the parties hereto, the Court administratively closes this case for a period of forty-five (45) days for the purpose of allowing the parties to complete settlement documents and file a joint stipulation of dismissal in this action.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ANITA LOUISE HOWERTON, individually and as representative of the heirs and estate of Walter Allen Howerton, Deceased,

Plaintiff(s),

v.

FIBREBOARD CORPORATION, et al.,

Defendants.

No. 87-C-353-C

ORDER

NOW, on this 10 day of Aug, 1989, this matter comes before the Court upon Stipulation for Dismissal With Prejudice by Plaintiff and Defendant, Owens-Corning Fiberglas Corporation.

It being shown to the Court that the issues and disputes between them have been compromised and settled, the above matter is dismissed with prejudice as to Defendant, Owens-Corning Fiberglas Corporation, only.

IT IS SO ORDERED.

JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LILLIAN A. GRAHAM,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., a Delaware corporation,

Defendant.

No. 86-C-516-C

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered on behalf of defendant, American Airlines, Inc., and against plaintiff, Lillian A. Graham.

IT IS SO ORDERED this 10th day of August, 1989.

H. DALE COOK
Chief Judge, U. S. District Court

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LILLIAN A. GRAHAM,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., a Delaware corporation,

Defendant.

No. 86-C-516-C

FINDINGS OF FACT and CONCLUSIONS OF LAW

The above-styled action for discrimination on account of sex predicated on 42 U.S.C. §2000(e) et seq., Title VII of the Civil Rights Act of 1964 came on for nonjury trial. Evidence was presented on May 9 to May 13, 1988, May 16 to May 20, 1988, May 23 to May 24, 1988, March 13 to March 16, 1989, and March 20 to March 22, 1989. Closing argument was held on March 23, 1989. After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact and Conclusions of Law in accordance with Rule 52, F.R.Cv.P.

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FINDINGS OF FACT

A. Jurisdiction and Venue

1. The alleged acts of employment discrimination upon which plaintiff predicates her action occurred during the years 1984 and 1985.

2. The plaintiff, Lillian Graham (Graham), has filed the following charges of discrimination.

a. March 5, 1985 charge of discrimination filed with Equal Employment Opportunity Commission (EEOC).

b. June 26, 1985 charge of discrimination filed with Oklahoma Human Rights Commission (OHRC).

c. August 22, 1985 charge of discrimination filed with the OHRC.

d. October 1, 1985 charge of discrimination filed with the EEOC.

A notice of right to sue was issued on February 24, 1986. On May 23, 1986, Graham filed her Complaint within ninety (90) days of the notice.

3. The defendant, American Airlines, Inc. (American), is an employer engaged in an industry that affects commerce and employs more than fifteen (15) employees for each working day in each of the twenty (20) or more calendar weeks in the calendar years involved herein. Thus, American was an employer within the meaning of Title VII during the calendar years involved herein.

4. The alleged unlawful employment practices which are the subject of this action were committed in Tulsa, Oklahoma, within the Northern District of Oklahoma.

B. Liability of Defendant American

5. Graham is an adult female and resident of Tulsa, Oklahoma.

6. On July 1, 1968, Graham was employed by American. Graham's employment was subject to the terms of employment appearing on the employment application she signed when she became employed by American. Graham was discharged from American on October 31, 1985 for the stated reasons of insubordination, loafing on the job and failure to cooperate with other employees in violation of Company Rules 7, 12 and 15 and her overall employment record consisting of the following disciplinary actions:

July 17, 1984	C-314	Three-Day Suspension and Warning
June 24, 1985	C-314	Five-Day Suspension and Warning
July 2, 1985	C-314	Warning
Sept 27, 1985	C-314	Eight-Day Suspension and Final Warning

During her employment, Graham was affected by several layoffs due to a reduction in force; therefore Graham was employed by American for a total period of approximately ten (10) years.

7. At all times pertinent to her Title VII claim, Graham was an airplane mechanic at American assigned to the Tulsa maintenance and engineering facility and was a member of the collective bargaining unit represented by the Transport Workers Union of America, AFL-CIO (TWU). Graham's employment with American was governed by the Collective Bargaining Agreement.

8. Under the labor agreement, American recognized the TWU as the sole and exclusive collective bargaining representative of the employees covered thereby, with respect to wages, hours of employment and other conditions of employment as provided by the Railway Labor Act, 45 U.S.C. §151 et seq. Under the labor agreement, American retained the right to the extent not limited or modified by the terms and conditions of the agreement to hire, promote, assign to shifts, maintain discipline and discharge for justifiable cause. American and the TWU further agreed that the agreement contained the whole agreement of the parties as to all existing matters that may be subject to the Collective Bargaining Agreement for the duration of the labor agreement.

9. The arbitrators who heard Graham's grievances are members of the American Association of Arbitrators and were chosen by mutual agreement between American and the TWU.

10. Graham was hired on July 1, 1968 as a junior mechanic in the components/avionics maintenance department. On July 1, 1969, Graham was promoted to a mechanic after passing the qualifying test for electrical instrument overhaul. On August 28, 1970, Graham was laid off due to a reduction in force at American. On September 10, 1970, Graham failed the qualifying test for a gyro instrument overhaul.

11. On September 10, 1973, Graham was recalled from layoff and assigned to the components/avionics maintenance department. On November 11, 1974, Graham was again laid off due to a reduction in force.

12. On February 3, 1977, Graham was recalled from layoff and assigned to the aircraft maintenance department.

13. On July 27, 1977, Graham received a C-314 disciplinary warning for being in the smoking area for an excessive time period in violation of Rule 15 of American's Rules and Regulations preventing loafing on the job. A C-314 Form is used to notify employees regarding disciplinary action up to and including discharge. Graham filed a grievance objecting to the warning. A neutral arbitrator upheld American's disciplinary warning contained in the C-314.

14. On october 18, 1977, Graham received a C-314 disciplinary warning for violating Rule 3, remain in work area. This grievance was denied at the first and second steps. Graham did not pursue the disciplinary warning to arbitration.

15. On June 7, 1978, Graham received a C-314 and a three-day disciplinary suspension without pay for violating Rule 3, remain in work area, and Rule 15, restriction of output. This discipline was upheld in arbitration by the neutral arbitrator.

16. On March 3, 1979, Graham was reassigned within aircraft maintenance from the 707 aircraft to the 747 aircraft. On March 2, 1979, Graham was reassigned from the 747 aircraft to the 707 aircraft.

17. On September 14, 1979, Graham received a C-314 form for violating Rule 3, out of work area, and Rule 15, restriction of output, resulting in Graham's discharge from American. On october 8, 1979, at the request of the TWU, management converted Graham's

discharge to a disciplinary suspension and she was reinstated without pay pursuant to an greed rehabilitation plan.

18. On October 12, 1979, Graham filed an EEOC charge of discrimination based on sex alleging that her discharge was based on sexual harassment. After an on-site investigation of Graham's charge by the EEOC, the EEOC on July 10, 1980 issued a written determination in favor of American.

19. On May 8, 1980, Graham received a C-314 disciplinary warning for violating Rule 22 for receiving a garnishment. The garnishment was later discharged by the court. On July 23, 1980, Graham began a leave of absence for sick leave.

20. On September 2, 1980, Graham returned from sick leave and was assigned to the 747/DC-10 line in aircraft maintenance.

21. On August 28, 1981, Graham was laid off due to a reduction in force. On January 25, 1982, Graham was recalled from layoff and assigned to the 727 line in aircraft maintenance. On September 1, 1982, Graham was reassigned within aircraft maintenance from the 727 to the 747/DC-10 line.

22. On April 26, 1983, Graham received a C-314 and ten-day disciplinary suspension for unsatisfactory job performance due to Graham's failure to connect a pressure line on the aircraft's emergency evacuation equipment which was discovered by the FAA during a surprise inspection at the Los Angeles International Airport. This discipline was upheld in arbitration. Two male mechanics also received C-314's and ten-day and twelve-day disciplinary suspensions, respectively, for the same unsatisfactory

job performance. The male supervisor involved received a ten-day suspension.

23. On July 11, 1983, Graham was reassigned (labor loaned) from aircraft maintenance to the JT-3 check and repair shop in power plant maintenance. On October 10, 1983, Graham was reassigned from power plant maintenance back to aircraft maintenance.

24. On March 1, 1984, Graham was reassigned within aircraft maintenance from the 727 line to the 747/DC-10 line at her request.

25. On July 17, 1984, Graham was issued a C-314 and a three-day disciplinary suspension for her failure to tighten a "B" nut on an aircraft. Such discipline for a leak found at a leak check was unprecedented at American. Graham filed a grievance protesting this disciplinary action in accordance with labor agreement. The arbitration board upheld American's disciplinary action.

26. On August 2, 1984, Graham was reassigned from the aircraft maintenance department to another department at the American engineering and maintenance base and was permanently restricted from working in the aircraft maintenance department. Graham filed a grievance protesting this permanent restriction on August 3, 1984 which grievance stated in pertinent part:

> On August 2, 1984, I received an AA Form No. 541-3 reassigning me from aircraft maintenance, shop 2254-2 to the blade and vane shop, 259-9. I also received a letter from acting aircraft maintenance director, C. L. Harliss, permanently restricting me from working in the aircraft maintenance department.
>
> This is a violation of the TWU-AA Agreement. The company has treated me unjustly, they have harassed, threatened and discriminated against me because I am a woman. Therefore, I grieve to be assigned back to the aircraft maintenance, shop 2254-2 immediately. I am qualified to perform this work. Also, I grieve the above mentioned letter be rescinded and removed from all records.
>
> (Defendant's Exhibit 54).

On March 28, 1985, the System Board of Adjustment made the following arbitration award:

> The claim by the union and Ms. Lillian Graham, that she had been subjected to unequal treatment for reason of her sex, in violation of the Agreement's Article 28, is denied.
>
> The claim by the Union and Ms. Lillian Graham that the permanent restriction of her working as an Airline Mechanic in the Aircraft Maintenance Department violated the Agreement, is sustained. The restriction shall be rescinded and job vacancies in the Aircraft Maintenance Department shall be available to her as provided by the Agreement.
>
> (Defendant's Exhibit 58).

27. Field trip hours were to be equalized among the employees under the collective bargaining agreement because field trips were attractive by virtue of the travel and overtime. On December 17, 1984, Graham submitted her AOI requesting her assignment to a scheduled field trip to Wichita, Kansas, and was present when Crew Chief Nevins told Supervisor Barton that if Graham went on the field trip, Barton could get another crew chief to go. On the same day, Supervisor Barton filed his AOI denying Graham's field trip permission because her medical file showed that she was restricted to safety wiring work because of elbow problems. Graham informed Supervisor Barton that her elbow was no longer a problem. In response and on December 18, 1985, Supervisor Barton conducted a F-29 disciplinary meeting because Graham did certain work on a pump as recommended by another mechanic and suggested a possible suspension. Graham offered to withdraw her field trip request if he would not suspend her. On the same day, December 18, 1984, Graham filed her AIO withdrawing her request for the field trip and no suspension was imposed.

28. On August 13, 1984, Graham was reassigned within power plant maintenance from the blade and vane shop to the JT-3 check and repair shop. On March 5, 1985, Graham filed an EEOC charge of discrimination based on sex and based on her permanent restriction from working in aircraft maintenance.

29. The Supervisor's Record of Discussion and Action to Graham indicates George Barton counseled Graham about her job performance on several occasions. On May 6, 1985, George Barton gave Graham an overall performance rating which was below average.

30. On June 7, 1985, Graham worked on a fourth stage turbine disk. She reported a dent to her supervisor. On June 24, 1985, plaintiff received a five day suspension without pay. Graham's grievance was denied on September 30, 1985. (Defendant's Exhibit 70). During trial, plaintiff attempted at length to demonstrate (1) the disk on which she was working belonged to American, and was distinct from a disk belonging to Ports of Call, and (2) she did not damage the disk. The Court has concluded that the disk involved was the Ports of Call disk, and that plaintiff damaged it. Under questions from the Court, plaintiff's memory was unclear as to precisely what happened. (See Transcript, Vol.V, pp.486-492). Plaintiff's daughter, Sandra Whiteis, testified at trial that her mother telephoned one day from work, admitting that plaintiff had damaged a turbine disk. Viewing also the testimony of various other eyewitnesses, the Court has concluded that the preponderance of the evidence lies in defendant's favor on this issue.

31. Graham took a one week vacation the next day, June 8, 1985. She travelled to American's headquarters in Dallas, Texas. She sought to report sexual abuse to Vice President Masiello. He told plaintiff to provide the names of offenders and witnesses to her supervisors. On plaintiff's first day back, June 17, 1985, supervisor Barton yelled at her for reporting to Dallas and ordered her to sort out nuts and bolts.

32. Certain records pertinent to the disk discipline were missing. The Court finds that the factual determination can still be made and that American's explanation for the missing records (they were used in arbitration proceedings and apparently misplaced) is plausible. A "scrap tag" produced at trial shows the Ports of Call disk to have been scrapped as useless on May 13, 1985. Viewing the totality of evidence, the Court finds the most plausible conclusion to be that a "5" (representing the fifth month) was written, when a "6" was intended, and that the disk was scrapped on June 13, 1985.

33. On June 24, 1985, Graham received a C-314 and five-day disciplinary suspension for unsatisfactory job performance which was upheld in arbitration. On June 26, 1985, Graham filed an EEOC charge of discrimination based on sex and based on the alleged sexual harassment by her co-workers. When Graham complained in June, 1985, of sexual harassment, American conducted an investigation of her complaints by interviewing those persons who she had named as persons harassing her. While American concluded that no sexual harassment had occurred, American did find that Graham and

two male mechanics, Alan Powers and Darrell Martin, had engaged in conduct which violated Rule 31, horseplay, for which Graham, Powers and Martin each received a disciplinary C-314 warning. The C-314 Graham received for violating Rule 31, horseplay, was upheld in arbitration.

34. Graham received her Airframe and Power Plant (A&P) License on July 16, 1985.

35. On August 22, 1985, Graham filed an EEOC charge of discrimination based on sex and based on her five-day disciplinary suspension for unsatisfactory job performance imposed by the June 24, 1985 C-314.

36. On September 26, 1985, Graham did not take her break with the men at 0800 hours but worked for a while and then went to the ladies' rest room and took a 10-15 minute break. While there, Graham read a jewelry brochure with order forms left in the restroom by another employee.

37. On September 27, 1985, Graham received a C-314 and eight-day disciplinary suspension for violating Rule 3, remaining in work area, and Rule 15, restriction of output, which suspension was upheld in arbitration. The infraction citation of September 27, 1985, was based, in part, on information supplied by a female office worker sent to the women's restroom by Ken Harding of Labor Relations to spy on Graham. On October 1, 1985, Graham filed an EEOC charge of discrimination based on sex and based on the eight-day suspension and alleged bypass for overtime work.

38. On October 31, 1985, Graham was discharged from American pursuant to Form C-314 for violation of Rule 7, 12 and 15 and because of her overall employment record consisting of the following disciplinary actions:

July 17, 1984	C-314	Three-Day Suspension and Warning
June 24, 1985	C-314	Five-Day Suspension and Warning
July 2, 1985	C-314	Warning
Sept 27, 1985	C-314	Eight-Day Suspension and Final Warning

This discharge was upheld in arbitration.

39. The plaintiff has complained that she was assigned undesirable tasks while employed in the JT-3 department such as sorting nuts and bolts, painting equipment, washing airplane engines and filling out paperwork or not rotated on her job assignments because of her sex or in retaliation for her filing EEOC charges. The Court finds that the plaintiff has failed to establish that she was assigned these jobs or not rotated because of her sex or in retaliation for her filing EEOC charges of sex discrimination.

40. The plaintiff also complained that other mechanics took breaks and committed acts of unsatisfactory job performance and were not disciplined. The plaintiff failed to establish that she was treated any differently than any other mechanic.

41. The plaintiff has also complained that she was denied paperwork in violation of FAA regulations or denied documentation which would prove she did not damage a turbine disc because of her sex or in retaliation for her filing EEOC charges. The Court finds that the plaintiff has failed to establish that she was denied

paperwork in violation of FAA regulations or denied documentation which would prove she did not damage a turbine disc.

42. The plaintiff complains that she was required to take a qualifying test in order to bid on certain jobs. The defendant, American, established that the requirement that plaintiff take a qualifying test was made only after the company began to hold grave doubts that the plaintiff could perform certain jobs. Further, the defendant had the contractual right to require that the plaintiff take a qualifying test. The Court further finds that plaintiff refused to take a qualifying test. The Court finds that the requirement that plaintiff take a qualifying test in order to bid on certain jobs was not made because of plaintiff's sex, or in retaliation against plaintiff for filing EEOC charges or to harass plaintiff because of her sex.

43. The plaintiff complains that she was the victim of sexual harassment by two mechanics and her crew chief. The Court finds that in June, 1985, after plaintiff had made several allegations of harassment against two male mechanics, Darrell Martin and Alan Powers, the defendant conducted a thorough investigation of plaintiff's charges. The defendant interviewed each person named by the plaintiff as a person who had either harassed plaintiff or, according to plaintiff, had observed any incident of harassment. While the defendant concluded that no sexual harassment of plaintiff had occurred, American did find that Graham and the two male mechanics, Alan Powers and Darrell Martin, had engaged in conduct which violated Rule 31, horseplay, for which Graham, Powers and

Martin each received a disciplinary C-314 warning. Plaintiff's testimony in this regard was not incredible in many respects, but fails to meet the necessary burden of proof standing alone.

44. Most witnesses testified that Graham was an average mechanic. The Court finds from the evidence presented that the plaintiff has established that she was qualified for and able to do the job for which she was discharged.

45. From the admitted facts and evidence admitted at trial, the Court finds that Graham received numerous C-314 disciplinary forms for violations of American's rules and regulations including incidents of unsatisfactory job performance. The supervisor notes also establish that Graham's supervisors counseled Graham on several occasions for poor job performance. The Court finds that Graham was a disciplinary problem. Graham frequently refused to remain in her work area. With only one exception, all the arbitration awards all held that defendant's disciplinary actions of plaintiff were fair, proper and not based on unequal treatment.

46. Graham claimed that American engaged in a pattern of disparate treatment, retaliation and harassment against her because of her gender. The Court fails to discern such a pattern.

47. The Court further finds that male mechanics received similar disciplinary actions for similar violations of American's rules and regulations. The Court finds that no employee with as many C-314's as Graham was allowed to remain employed at American.

48. The Court finds that Graham was not subject to unwelcome sexual harassment. There was conflicting testimony regarding

plaintiff's wearing of "suggestive" T-shirts, and engaging in "shop talk" (i.e., using profanity). The Court finds that plaintiff failed to sustain her burden of proof on the issue.

49. The Court further finds that as noted before when Graham made her allegations of sexual harassment, her claims were immediately and thoroughly investigated and appropriate action was taken. Graham identified three male mechanics who she alleged sexually harassed her. American concluded after a thorough investigation that while no sexual harassment had occurred, there were instances of horseplay in which Graham herself had engaged. The defendant therefore issued horseplay warnings to Graham and two of the three mechanics. Graham also complained that a newspaper article written about her had been altered by some male mechanics. The written additions ridiculed Graham for poor job performance. The alterations contained no sexual innuendos or vulgarities. When Graham brought the newspaper article to the attention of defendant, the defendant again thoroughly investigated the matter. Supervisor Barton issued a written warning to the three mechanics thought to be involved stating that any such future conduct could result in further discipline up to and including discharge. Additionally, when Graham complained that an inspector had used vulgar language toward her, the inspector's supervisor issued a written warning to the inspector not to speak to Graham in that manner. The Court further finds that Graham was not prevented from bidding back into aircraft overhaul. To the contrary, Graham could have bid back into aircraft overhaul if she would have passed a qualifying test.

American's administration manuals allow management to require a mechanic to take a qualifying test if management doubts a mechanic's skill level to perform a job. The Court notes that the arbitrator who lifted Graham's permanent restriction from aircraft overhaul did not place her back into aircraft overhaul but simply stated that American should allow Graham to bid into aircraft overhaul if she wanted the "risk of failing once again and incurring harsher discipline". (March 28, 1985 arbitration decision by Milt Rubin). The Court finds that American was not restricting Graham from bidding back into aircraft overhaul but rather was simply exercising management prerogative to require Graham to take a qualifying test.

50. The Court further finds that Graham was not passed over for overtime as a result of retaliation. The Court finds that in order to be eligible for an overtime job, a mechanic must have previous experience with that job. The Court finds that Graham had no experience in performing the tasks required for overtime.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

A. Jurisdiction

1. All filing requirements of Title VII of the Civil Rights Act of 1964 as amended in 1972 (Title VII) which are a prerequisite to the jurisdiction of this Court have been satisfied by the plaintiff herein. Title 42 U.S.C. §2000(e)-5(e)(f)(1).

2. The defendant therein is an employee subject to the provisions of Title VII. 42 U.S.C. §2000(e)(b),(h).

3. Venue properly lies in this Court. 42 U.S.C. §2000(e)-5(e)(f)(3).

B. Weight to be Given to the Arbitration Decisions

As noted, with one exception the penalties imposed on plaintiff were upheld in arbitration. It is established that "a court must not give a prior arbitration preclusive effect in a Title VII suit." Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1553 (10th Cir. 1988). However, defendant asks the Court to give great weight to the arbitration decision, based upon factors enunciated in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The Court finds this precedent largely inapplicable because in the present record there is only one instance of plaintiff specifically raising a charge of sexual discrimination, as distinct from basic unfairness. A court can accord an arbitral determination great weight when the determination gives full consideration to an employee's Title VII rights. Alexander, 415 U.S. at 60 n.21. Here, there has been an insufficient showing that such full consideration was given. Congress has entrusted the ultimate resolution of discriminatory employment claims to the judiciary. Darden v. Illinois Bell Tele. Co., 797 F.2d 497, 504 (7th Cir. 1986). The Court has determined to give little weight to the arbitration decisions.

C. Plaintiff's Sexual Harassment Claim

In Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), the United States Supreme Court affirmed the development of a cause of action for "sexual harassment" under Title VII.

Prima Facie Case

In a claim of hostile work environment because of sexual harassment, the employee must prove the following for a prima facie case: (1) that the employee belongs to a protected group; (2) that the employee was subject to "unwelcome" sexual harassment; (3) that the harassment complained of was based on sex; and (4) that the harassment complained of affected a "term, condition, or privilege" of employment. Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1557 (11th Cir. 1987). The Court must conclude that plaintiff failed to establish a prima facie case. Testimony of plaintiff's daughter as to statements of plaintiff tends to resolve the conflicting evidence in the conclusion that plaintiff was not subjected to "unwelcome" sexual harassment. The Court wishes to make clear that it is viewing the totality of the circumstances. The wearing of a T-shirt with a "suggestive" phrase or picture on it or the use of profanity is not an invitation to sexual harassment. In the face of conflicting testimony, even assuming arguendo that certain instances of touching by co-workers may well have occurred and been unwelcome, plaintiff has not shown that the sexual harassment was sufficiently severe or persistent to affect seriously her psychological well-being. Sparks, 830 F.2d at 1561. The sexual conduct was not, from this record, sufficiently

pervasive to create a hostile or offensive work environment. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987). Thus, even if the second element of the prima facie case has been established, the fourth has not.

It has also been held that plaintiff must prove employer liability for another employee's actions under agency principles. See Hicks, 833 F.2d at 1417-18. One court has stated that

> the ultimate burden of proof is upon the plaintiff to additionally demonstrate respondeat superior liability by proving that the employer, through its agents or supervisory personnel, knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action.
>
> Rabidue v. Osceola Refining Co., 805 F.2d 611, 621 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987).

Plaintiff has also failed to meet this burden of proof. From the record before the Court, those allegations which were made were investigated and admonitions given.

D. Plaintiff's Disparate Treatment Claim

Prima Facie Case

In a discharge case, based on disparate treatment, a prima facie case consists of the following: (1) plaintiff is a member of a protected group; (2) she was qualified for the position from which she was dismissed; (3) she was removed from that position; (4) she was replaced by someone not a member of the protected group. Whatley v. Skaggs Companies, Inc., 707 F.2d 1129, 1135 (10th Cir.), cert. denied, 464 U.S. 938 (1983).

The plaintiff herein has made out a prima facie case of discrimination in her termination from employment.

The burden that shifts to the defendant requires defendant to rebut the presumption of discrimination by producing evidence of a legitimate non-discriminatory reason for the discharge of the plaintiff. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981): "The defendant need not persuade the Court that it was actually motivated by the proffered reasons. (citation omitted). It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. 254-255.

Defendant has met its burden of rebutting the plaintiff's prima facie case of discrimination (assuming the prima facie case has been shown) by articulating a lawful reason for its action, that is, by producing admissible evidence which would allow the Court to conclude that the employment decision had not been motivated by discriminatory animus. Id. 257.

The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. Texas Department of Community Affairs, supra, 253. In essence, the burden of the plaintiff "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a mere pretext for discrimination," merges with the ultimate burden of proving intentional discrimination. Id. 253, 256. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805-06 (1973); Sabol v. Snyder, 524 F.2d 1009, 1012-13 (10th Cir. 1975).

It has been held that

> Where, as here, the employer's asserted justification is that the employee violated a work rule, the employee must prove pretext by showing either that she did not violate the work rule or that, if she did, other employees not within the protected class who engaged in similar acts were not similarly treated.
>
> Sparks, 830 F.2d at 1563.

Plaintiff has failed to sustain this burden. The Court is persuaded that plaintiff did violate the work rules in question and that other employees who violated the rules were similarly treated. Plaintiff's disparate treatment claim fails.

E. Plaintiff's Retaliation Claim

Although such a claim was not emphasized by plaintiff, defendant has responded in its briefs and proposed findings to a possible retaliation claim.

To establish a prima facie case, plaintiff must show:

1. That she engaged in protected opposition to Title VII discrimination;
2. Adverse action by the employer subsequent to or contemporaneous with such employee activity;
3. A causal connection between the protected activity and the adverse employment action.

> Burrus v. United Telephone Co., 683 F.2d 339, 343 (10th Cir. 1982).

While plaintiff demonstrated that she filed EEOC charges and travelled to Dallas to report alleged discrimination (both protected activities), she failed to show a causal connection between her activities and her discharge. Again, the preponderance of the evidence demonstrates that plaintiff's rule violations were the cause of her discharge.

Plaintiff's State Law "Claims"

On March 18, 1987, the Court granted defendant's motion for partial summary judgment as to plaintiff's second cause of action for emotional distress. On April 5, 1988, the Court denied plaintiff's motion to reconsider that Order. During trial, plaintiff made an oral motion pursuant to Rule 15(b) F.R.Cv.P. to add claims for fraud and intentional infliction of emotional distress. The motion was denied. Now, in her post-trial brief, plaintiff repeats the request. For the reasons stated at trial and in the previous Orders mentioned above, the Court again denies the request.

It is the Order of the Court that judgment be entered in favor of defendant and against plaintiff.

IT IS SO ORDERED this 10th day of August, 1989.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP JAMES GUERRA,

Plaintiff,

vs.

No. 87-C-286-E

BOARD OF COUNTY COMMISSIONERS, et al.,

Defendants.

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 10th day of August, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA,

Plaintiff,

vs.

FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, et al.,

Defendants.

No. 88-C-254-C

ORDER

Now before the Court for its considerations are the cross-motions for summary judgment by the co-defendants, First National Bank and Trust Company of Tulsa (FNB) and Norma Applegate, successor trustee of certain trusts.

This action commenced as a declaratory judgment action to determine whether the professional liability insurance policy issued to the late F. Paul Thieman by plaintiff requires plaintiff to indemnify FNB against Applegate's claims against the Thieman estate. FNB is Successor Personal Representative of the Thieman Estate.

One of plaintiff's defenses to coverage as to a claim of one of the Thieman trusts is that the claim occurred after the claims period of the insurance policy in question had terminated. Defendant Applegate filed a cross-claim against FNB, alleging negligence on FNB's part for not notifying plaintiff until

February, 1988 of Applegate's claim. The cross-motions for summary judgment involve only this cross-claim.

Essentially, FNB argues that it could not have been negligent because no claim was asserted by Applegate which was covered by the insurance policy. Applegate filed a creditor's claim in the Thieman Estate probate case in December, 1984, a fact known to FNB. However, FNB focuses on the fact that said claim stated that it was based upon Thieman's "misappropriation" of trust funds. FNB argues that "misappropriation" necessarily means a deliberately wrongful act, and that such an act is not covered by the policy.

FNB cites various legal authorities supporting its definition of misappropriate. However, FNB does not indicate if these authorities were known to its official who declined to report the claim at the time of denial. Further, there has been no indication whether an attorney filled out the creditor's claim. If not, it is unclear that a layman must be expected to choose each word with the precision required of a lawyer. Particularly in view of the fact that this will be a bench trial, the Court is persuaded that further development of the record is required. Neither negligence nor its absence have been established.

As a secondary argument, FNB asserts that any negligence is attributable to Roberta Sue Thieman, executrix of the Thieman Estate at the time of the creditor's claim filing. FNB does not explain how any failure by Ms. Thieman relieved FNB of its duty to notify plaintiff. This argument is rejected.

It is the Order of the Court that the motion of First National Bank and Trust Company of Tulsa for summary judgment is hereby DENIED.

It is the further Order of the Court that the motion of Norma Applegate for summary judgment is hereby DENIED.

IT IS SO ORDERED this 10th day of August, 1989.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
KENNETH E. TUREAUD, et al.,	)	Bankruptcy No. 82-01269-W (Chapter 11)
	)	
Debtors.	)	
	)	
R. DOBIE LANGENKAMP, Trustee,	)	Adv. No. 84-0131-W
	)	
Appellee-Plaintiff,	)	
	)	
vs.	)	Dist. Ct. No. 89-C-292-B
	)	
J. ANTHONY MOOTER,	)	
	)	
Appellant-Defendant.	)	

ORDER OF DISMISSAL

Upon the Motion of the Appellee, for good cause shown, it is

ORDERED that the above styled appeal be and the same is hereby dismissed.

Done this 10th day of August, 1989.

S/ THOMAS R. BRETT
United States District Judge

IN UNITED STATES DISTRICT Court FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

MELVIN M. MCCOY,
445543750

Defendant,

FILED

AUG 10 1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

CIVIL NO. 89-C-584 B

CONSENT JUDGMENT

This matter coming on before this Court this 10th day of Aug, 1989, and the Court being informed in the premises and it appearing that the parties have agreed and consent to a judgment as set forth herein; in accordance therewith;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff, United States of America, have and recover judgment against the Defendant, MELVIN M. MCCOY, in the principal sum of $748.20, plus pre-judgment interest and administrative costs, if any, as provided by Section 3115 of Title 38, United States Code, together with service of process costs of $11.00. Future costs and interest at the legal rate of 7.75%, will accrue from the entry date of this judgment and continue until this judgment is fully satisfied.

DATED this 10 day of Aug, 1989.

By: Thomas R. Brett
U.S. DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

HERBERT N. STANDEVEN

District Counsel
Veterans Administration
Counsel for Plaintiff

AGREED By: Lisa A. Settle
LISA A. SETTLE, Attorney

AGREED: Melvin M. McCoy
MELVIN M. MCCOY

CERTIFICATE OF MAILING

This is to certify that on the ___ day of _____, 1989, a true and correct copy of the foregoing was mailed postage prepaid thereon to: MELVIN M. MCCOY, 15020 S. WACO, GLENPOOL, OK 74033.

Lisa A. Settle
LISA A. SETTLE, VA Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DON KERR,)
)
Plaintiff,)
)
v.) No. 88-C-710-C
)
AMPAD CORPORATION,)
)
Defendant.)

JUDGMENT

Now on this 25th day of July, 1989, comes on to be heard the oral application of the Defendant, Ampad Corporation, that judgment be entered upon the jury verdict herein. Upon due consideration, said application is sustained, and the Court hereby enters judgment in favor of the Defendant, Ampad Corporation, and against the Plaintiff, Don Kerr.

IT IS SO ORDERED!

H. Dale Cook, Judge of the United States District Court

Approved as to form and content:

Joseph Farris
Attorney for Plaintiff

Daniel E. Holeman
Attorney for Defendant

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FILED

AUG 10 1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) Civil Action No. 89-C-093-B
)
ONE 1984 LINCOLN CONTINENTAL)
MARK VII)
VIN 1MRBP98FOEY641916)
and)
ONE 1982 CHEVROLET CORVETTE)
VIN 1G1A8780C5119562)
)
Defendants.)

ORDER DISMISSING CLAIMS AND DECREE OF FORFEITURE

IT NOW APPEARS that the claims filed herein have been fully compromised and settled. Such settlement more fully appears by the written Stipulation For Compromise entered into between the Claimants, Robert DeBartolo and Sheli Scott, and the United States of America on the 3rd day of ~~July~~ August, 1989, and filed herein, to which Stipulation For Compromise reference is hereby made and is incorporated herein. Therefore, the claims filed herein should be dismissed with prejudice, and the Clerk of the Court should be authorized and directed to enter such dismissal of record in this civil action.

It FURTHER APPEARS that no other claims to said property have been filed since such property was seized.

Now, therefore, on motion of Catherine J. Depew, Assistant United States Attorney for the Northern District of

Oklahoma, and with the consent of Robert DeBartolo and Sheli Scott, it is

ORDERED that the claims of Robert DeBartolo and Sheli Scott in this action be, and the same hereby are, dismissed with prejudice, and it is

FURTHER ORDERED that the Clerk of this Court is hereby authorized and directed to enter in the records of this Court the dismissal of the claims filed herein by Robert DeBartolo and Sheli Scott, with prejudice, and it is

FURTHER ORDERED AND DECREED that the defendant vehicles be, and they hereby are, condemned as forfeited to the United States of America for disposition, according to law, and it is

FURTHER ORDERED that the United States Marshal shall return to Sheli Scott the bond posted by her in the amount of $1,010.00, and it is

FURTHER ORDERED that the bonds posted by Robert DeBartolo in the administrative action, in the amount of $1,062.00, shall be forfeited to the United States of America for disposition according to law.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 10 1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity,	)	
Plaintiff,	)	
vs.	)	No. 89-C-143B
CHARLES H. DAVIS and GINETTE M. PATCH, husband and wife, and ESTATE OF JACK PATTILLO,	)	
Defendants.	)	

ORDER PARTIALLY VACATING JUDGMENT

NOW on this 10th day of August, 1989, comes on for consideration the Motion to Partially Vacate Judgment filed herein by Plaintiff, Federal Deposit Insurance Corporation, in its corporate capacity ("FDIC").

This Court finds that such Motion is proper and should be granted.

IT IS, THEREFORE, ORDERED that the Journal Entry of Judgment entered by this Court on July 27, 1989, be and is hereby partially vacated, insofar as the same relates to and covers the following described real property and improvements:

> A tract of land in the N/2 NW/4 of Section 17, T22N, R12E, Osage County, Oklahoma, being more particularly described as follows, to-wit:
>
> Beginning at the Point of Intersection of the South line of said N/2 NW/4 and the centerline of an existing road, said point being S. 89°46'21" E. 632.80' from the Southwest Corner of said N/2 NW/4; thence S. 89°46'21" E. along the South line of said N/2 NW/4 a distance of 561.99'; thence N. 0°05'49" W. a distance of 443.79' to a point; thence N. 89°46'21" W. a distance of 321.43' to the centerline of said road; thence S. 28°27'42" W.

along said existing road a distance of 504.80' to the point of beginning.

IT IS FURTHER ORDERED that the July 27, 1989, Judgment shall otherwise remain in full force and effect.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

Sandra Lefler Cole.

Bradley K. Beasley, OBA #628
Sandra Lefler Cole, OBA #13309
Of BOESCHE, McDERMOTT & ESKRIDGE
800 Oneok Plaza, 100 W. 5th St.
Tulsa, Oklahoma 74103
(918) 583-1777

ATTORNEYS FOR PLAINTIFF
FEDERAL DEPOSIT INSURANCE CORPORATION

entered

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION and PERFECT INVESTMENTS, INC.,

Plaintiffs,

v. 84-C-934-C

DELAWARE ENERGY SHARES, DUNOCO DEVELOPMENT CORP., and LONNIE M. DUNN, JR.,

Defendants.

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Liquidating Agent of BANK OF COMMERCE AND TRUST COMPANY,

Counter Defendant.

ORDER

The court has for consideration the Report and Recommendation of the Magistrate filed July 13, 1989, in which the Magistrate recommended that judgment be entered in favor of FDIC on its Complaint against Dunoco Development Corp. and against the personal representative of the Estate of Lonnie M. Dunn, Jr., and that judgment be entered in favor of the FDIC, in its capacity as Liquidating Agent of the Bank of Commerce and Trust Company, on the Defendants' and Third Party Plaintiffs' Complaints against that entity. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the

Magistrate should be and hereby is affirmed.

It is therefore Ordered that judgment be entered in favor of FDIC on its Complaint against Dunoco Development Corp. and against the personal representative of the Estate of Lonnie M. Dunn, Jr., and further that judgment be entered in favor of the FDIC, in its capacity as Liquidating Agent of the Bank of Commerce and Trust Company, on the Defendants' and Third Party Plaintiffs' Complaints against that entity.

Dated this 8th day of August, 1989.

H. DALE COOK, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION and PERFECT INVESTMENTS, INC.,	)	
Plaintiffs,	)	
vs.	)	Case No. 84-C-934-C
DELAWARE ENERGY SHARES, DUNOCO DEVELOPMENT CORP., and LONNIE M. DUNN, JR.,	)	
Defendants.	)	
vs.	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Liquidating Agent of BANK OF COMMERCE AND TRUST COMPANY,	)	
Counter Defendant	)	

JUDGMENT

Judgment is hereby entered in favor of the Federal Deposit Insurance Corporation, in its corporate capacity, against Dunoco Development Corporation in the principal sum of $2,803,801.88, plus accrued interest through January 31, 1989, in the amount of $2,575,104.26, plus interest accruing thereafter at the rate of $1,497.92 per diem until paid.

Judgment is hereby entered against the personal representative of the Estate of Lonnie M. Dunn, Jr. in the principal amount of $900,000.00, with interest accruing from the date of judgment at the rate of 8.16% until paid.

Judgment is entered in favor of the FDIC, in its capacity as Liquidating Agent of Bank of Commerce and Trust Company, on Defendants' Counterclaim and/or Third Party Complaint against FDIC-LA.

JDM/07-89372/al

SO ORDERED this 8th day of Aug., 1989.

H. Dale Cook, District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DICK RALLS, Plaintiff,	)	
vs.	)	Case No. 89-C-111-C
ADESCO, INC., a corporation; KYRI, INC., a corporation; NESTOR, LTD., a corporation; and K. GEORGE PAGANIS, an individual and officer and director of ADESCO, INC., KYRI, INC., and NESTOR, LTD., Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before the Court on the Stipulation for Dismissal With Prejudice of the parties herein.

Being advised in the premises and for good cause shown, the Court hereby dismisses this matter with prejudice.

The Court further orders each party to bear its respective attorney's fees and costs of this action.

DATED this 9th day of August, 1989.

(Signed) H. Dale Cook

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHERYL A. WEBSTER,)
)
Plaintiff,)
)
vs.) No. 87-C-718-B
)
AVIS RENT-A-CAR SYSTEMS, INC.,)
)
Defendant.)

8-10-89

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This action for alleged race discrimination in employment in violation of Title 42 U.S.C. §2000(e) *et seq.* and pendent claims of breach of contract and public policy wrongful discharge, was tried to the Court, without a jury, on the dates of June 28, 29 and 30, and July 24, 1989. Following a consideration of the evidence presented and arguments of counsel concerning the relevant issues, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I. The parties stipulated to the following relevant facts in the Pretrial Order filed on June 26, 1989, and the Court so finds: (The Court's Findings in brackets were not set out in the Stipulation)

1. This action arises under Title VII of the Civil Rights Acts of 1964, 42 U.S.C. §2000(e).

2. Jurisdiction is founded upon 28 U.S.C. §§ 1331, 1332, and 1343.

3. Plaintiff is also invoking the pendent jurisdiction of the Court.

4. The amount in controversy in this matter exceeds Ten Thousand Dollars ($10,000.00), exclusive of costs and interest.

5. Plaintiff is an [black female] individual and is a citizen of the State of Oklahoma.

6. Defendant Avis is now and at all times mentioned herein was, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware [principal place of business New York] and doing business in the State of Oklahoma.

7. Defendant Avis is an employer within the meaning of 42 U.S.. §2000(e)(b).

8. Plaintiff began employment with Defendant Avis as a domestic sales agent on June 29, 1981.

9. Plaintiff was discharged from her employment on July 29, 1985.

10. Plaintiff timely filed a claim of race discrimination with the Equal Employment Opportunity Commission/

Oklahoma Human Rights Commission "EEOC/OHRC".

11. The Equal Employment Opportunity Commission ("EEOC") issued Plaintiff a right-to-sue letter dated June 1, 1987, and Plaintiff thereafter timely filed this action.

12. Plaintiff was given a final written warning, placed on thirty (30) days' probation and informed that at least ten (10) of her calls would be monitored during the probation period.

13. Plaintiff's calls were monitored thereafter on at least two (2) separate occasions.

14. a. The following hourly rates were paid to each reservation agent on the following dates:

1. February, 1986: $9.05 per hour.
2. February, 1987: $9.35 per hour.
3. January, 1988: $9.72-1/2 per hour.
4. February, 1989: $10.07 per hour.

b. The value of the Company's employee benefits which Plaintiff would have received had she not been discharged was 13% out of her wages.

c. Had Plaintiff remained employed by Avis to the present date, she would have received under the Avis ESOP, $196.52 on February 1, 1988 and $1,800.70 on February 1, 1989.

d. The cost to Plaintiff for insurance coverage would have been $12.00 per month single coverage, $15.00 for dependent coverage. Plaintiff had elected dependent coverage.

II. In Plaintiff's Exhibit 37 the parties stipulated to the Plaintiff's loss of wages, benefits, and employee stock options (ESOP) as follows:

July 29, 1985	Would have made with AVIS	$18,200.00
	Actually made	10,831.57
	Difference	7,368.43*
1986		18,824.00
		1,302.50
		17,521.50*
1987		19,448.00
		629.40
		18,818.60*
1988		20,228.00
		10,700.85
		9,527.15*
Jan. 1 to June 22, 1989		9,667.20
		7,168.50
		2,498.70
Total Lost Wages		$55,734.38
Value of Benefits 13%		7,245.47
ESOP (Employee Stock Ownership Plan)		196.52
		1,800.70
Grand Total		$64,977.07

III. The Plaintiff did not have a contract of employment for a specific term with the Defendant.

IV. Over the approximately four-year period prior to Plaintiff's termination her performance reviews indicated she was a satisfactory employee. Until the time of the events in question in July 1985, the Plaintiff's only significant employment deficiency was that she had previously been reminded of excessive absences. The Plaintiff had received two promotions during her time

of employment which included an assignment on the O-6 desk which was a special group of reservationists dealing with long-time customer corporate executives and the Secret Service.

V. On July 3, 1985, an Avis customer telephoned Avis management and complained that the Plaintiff had been rude and discourteous to him during a telephone conversation. The Plaintiff, coincidentally, received the telephone call from this complaining customer and referred the call on to a supervisor at the customer's request.[1]

VI. Following the customer complaint, Supervisor Kathleen Sullivan monitored and recorded approximately 25 calls received by the Plaintiff. During numerous of these calls the audio tape reveals the Plaintiff acted indifferently dealing with customers and was occasionally discourteous. Between calls the Plaintiff would use profanity at her station on the reservation floor, which could potentially be overheard by customers talking to other reservationists.

VII. According to the Avis Reservation Center Policy Guide (Plaintiff's Exhibit 1, page 69), use of profane or lewd language is a sufficient grounds for immediate dismissal. Rude or discourteous treatment of customers is a grounds for discipline.

---

[1]The Plaintiff recognized the complaining customer's voice and after she had transferred him through to the supervisor was heard to refer to the customer on the audiotape as an "asshole," "bastard," and "motherfucker."

VIII. Avis supervisors are expected and required to take corrective disciplinary action when an employee's performance is not in keeping with Avis standards. Except for more serious violations, supervisors may choose between various forms of progressive discipline such as counseling, verbal and written warnings, suspension and termination. Supervisors are vested with some discretion in reference to the level of discipline.

IX. On July 9, 1985, Michael Fitch, Division Manager, and Kathleen Sullivan met with Plaintiff and informed her of the results of the prior monitoring, during which Plaintiff exhibited rude behavior and use of profane language. Plaintiff at that time was given a formal written warning which placed her on thirty days' probation and informed her that at least ten of her calls would be monitored during the probation period. (Plaintiff's Exhibit 2).

X. On two separate occasions the Plaintiff's calls were monitored within the period. During the second monitoring session, Plaintiff again displayed indifferent and discourteous behavior. Specifically, Plaintiff sarcastically stated to a potential customer in reference to his inquiry concerning competitive car rental rates, "This is Avis, not Payless." The customer responded, indignantly, he knew it was not Payless, and hung up.

XI. Plaintiff was discharged on July 29, 1985 by Michael Fitch because of her rude and discourteous manner toward Avis customers, and use of profane language. (Plaintiff's Exhibits 2 and 20).

XII. Plaintiff requested, as authorized by the Avis Reservation Center Policy Guide (Plaintiff's Exhibit 1, p.71) that Supervisor John Sellers (a black male) review her termination. After Mr. Sellers' review he concluded the termination was justified for the reasons stated. (Plaintiff's Exhibits 3 and 4).

XIII. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging violation of 42 U.S.C. §2000(e). Plaintiff received a right-to-sue letter from the EEOC on June 1, 1987.

XIV. From a review of all of the evidence presented, the Plaintiff has failed to establish by a preponderance of the evidence that her termination of employment was influenced or motivated by considerations of her race. It cannot be reasonably concluded from the evidence that Defendant's stated reason of Plaintiff's indifference and rude and discourteous treatment of customers or profanity at her work station was pretextual.

XV. Plaintiff has made no showing that she was treated differently from similarly situated white employees, and therefore has failed to raise an inference of discriminatory treatment based on race.

XVI. The manner in which Plaintiff was disciplined by first being issued a final warning and placed on thirty days' probation and then ultimately terminated, was reasonably consistent with the way other Avis employees were dealt with under similar employee conduct situations, and was fair under the circumstances.

XVII. Plaintiff has made no showing the Defendant breached any contractual obligation which it owed to the Plaintiff.

XVIII. Plaintiff had made no showing that her discharge and termination was wrongful or in any way violative of public policy.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this case. 42 U.S.C. §2000(e) *et seq*; 42 U.S.C. §1331, §1332, and §1343.

2. Any Finding of Fact above which might be properly characterized a Conclusion of Law is incorporated herein.

3. Under 42 U.S.C. §2000(e) the Plaintiff has the initial burden of establishing a *prima facie* case by showing that the Defendant acted with unlawful discriminatory purpose. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Once a *prima facie* case is established the employer need only articulate some legitimate, non-discriminatory reason for the subject employment decision. Board of Trustees v. Sweeney, 439 U.S. 74 (1978); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1980); McDonnell Douglas v. Green, *supra*. The employer bears the burden of explaining clearly the nondiscriminatory reasons for its employment action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

4. After the Defendant has articulated the nondiscriminatory reason or reasons for its employment action, the Plaintiff must

then prove by a preponderance of the evidence that the reasons explained are a pretext for discrimination. McDonnell Douglas v. Green, 411 U.S. at 904-5, 907; Foster v. MCI Telecommunications Corp., 773 F.2d 1116 (10th Cir. 1985), and Ray v. Safeway Stores, 614 F.2d 779 (10th Cir. 1980).

5. Plaintiff has failed to establish a *prima facie* case of discriminatory discharge because she has failed to show that she was treated any differently than similarly situated nonblack employees in reference to her discharge.

6. Defendant Avis rebutted Plaintiff's claim of race discrimination by articulating a legitimate nondiscriminatory reason for Plaintiff's discharge, i.e., because of her indifferent and discourteous manner towards Avis customers as well as her indiscriminate use of profane language. Plaintiff was discharged for nondiscriminatory reasons, not on the basis of her race.

7. The evidence has not established Plaintiff's alleged pendent claims of breach of contract or wrongful discharge centered in public policy reasons. Burk v. K-Mart Corp., 770 P.2d 24 (Okl. 1989).

8. A Judgment shall be filed contemporaneous herewith in favor of the Defendant and against the Plaintiff in accordance with these Findings of Fact and Conclusions of Law.

DATED this 10th day of August, 1989.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHERYL A. WEBSTER,)
)
Plaintiff,)
)
vs.) No. 87-C-718-B
)
AVIS RENT-A-CAR SYSTEMS, INC.,)
)
Defendant.)

8-10-89

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby entered in favor of the Defendant, Avis Rent-A-Car Systems, Inc., and against the Plaintiff, Sheryl A. Webster, and Plaintiff's action is hereby dismissed. Costs are to be assessed against the Plaintiff, if timely applied for pursuant to Local Rule, and each party shall pay their own respective attorneys fees.

DATED this 10th day of August, 1989.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
HERBERT A. ROBERTS,)
)
Defendant.) CIVIL ACTION NO. 81-C-449-C

DEFAULT JUDGMENT

This matter comes on for consideration this 8th day of August, 1989, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Nancy Nesbitt Blevins, Assistant United States Attorney, and the Defendant, Herbert A. Roberts, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Herbert A. Roberts, was served with Summons and Complaint on December 28, 1988. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant,

Herbert A. Roberts, for the sum of $1,565.10, as of August 2, 1989, plus interest at the rate of 12 percent per annum, until judgment, plus interest thereafter at the current legal rate of 7.75 percent per annum until paid, plus costs of this action.

UNITED STATES DISTRICT JUDGE

NNB/mp

ejj

OBA # 5026

AUG -9 1989

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEFFERSON INSURANCE COMPANY, a New York corporation,

Plaintiff,

vs.

MICHAEL GOWER,

Defendant.

No. 89-C-15-E

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Jefferson Insurance Company, and Michael Gower, Defendant, and jointly stipulate pursuant to Federal Rules of Civil Procedure 41, and the above captioned matter can and is dismissed with prejudice as all issues in the case have been settled.

Respectfully submitted,

KNOWLES, KING AND SMITH

Closed

By _____
DENNIS KING - OBA # 5026
Attorney for Plaintiff

603 Expressway Tower
2431 East 51 Street
Tulsa, Oklahoma 74105
(918) 749-5566

RICHARDSON, MEIER & ASSOCIATES

By _____
GREGORY G. MEIER - OBA # 6122
Attorney for Defendant and
Counterclaimant,
Michael B. Gower

5727 South Lewis, Suite 520
Tulsa, Oklahoma 74105
(918) 492-7674

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUG -9 1989

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

AMERICAN GUARANTY INVESTMENT CORPORATION,	§	
Plaintiff,	§	
vs.	§	Case No. 89-C0014-C
MIDAMERICA FEDERAL SAVINGS AND LOAN ASSOCIATION AND STATE FEDERAL SAVINGS AND LOAN ASSOCIATION,	§	
Defendants.	§	

MUTUAL DISMISSALS WITH PREJUDICE

Plaintiff American Guaranty Investment Corporation and Defendant and Third Party Plaintiff State Federal Savings and Loan Association mutually dismiss with prejudice their respective claims, counterclaims and third-party claims in the above-styled action.

Respectfully submitted,

John D. Clayman

Mike Barkley
Frank H. McCarthy
John D. Clayman
BARKLEY, RODOLF, SILVA,
McCARTHY & RODOLF
2700 Mid-Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 599-9991

Attorneys for State Federal
Savings and Loan

Curtis Biram
Biram & Kaiser
Pratt Tower, Sixth Floor
125 West 15th Street
Tulsa, Oklahoma 74119

Attorneys for AGIC and
Allen V. David

CERTIFICATE OF SERVICE

I certify that on the 9th day of August, 1989, a true and correct copy of this pleading was mailed, with proper postage, to the following counsel who have appeared in this action:

Richard Hix
L. Dru McQueen
Doerner, Stuart, Saunders, Daniel & Anderson
1000 Atlas Life Building
Tulsa, Oklahoma 74103

Barry K. Beasley
Huffman, Arrington, Kihle, Gaberino & Dunn
1000 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ORS CORPORATION, an Oklahoma corporation, et al.,

Plaintiffs,

vs.

WALTER L. MAGUIRE a/k/a WALTER L. MAGUIRE, SR., et al.

Defendants,

WALTER L. MAGUIRE a/k/a WALTER L. MAGUIRE, SR., et al.

Defendants/Counterplaintiffs,

vs.

ROBERT A. ALEXANDER, JR., et al.,

Counterdefendants,

and

DON EVE, et al.,

Additional Counterdefendants.

No. 87-C-426-E

STIPULATION OF DISMISSAL

COME NOW Richard Cowan, an Additional Third-Party Defendant, and Walter L. Maguire, Sr., Walter L. Maguire, Jr., The Maguire Foundation, Inc., a Connecticut corporation, Uniterra Corporation, a Nevada corporation, and Premier Title and Mortgage Company, Inc., a Connecticut corporation, the Defendants/Counter-Plaintiffs, the undersigned parties, and pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, hereby

stipulate to the dismissal with prejudice of all claims between and among them in this action.

Respectfully submitted,

WILLIAM J. DOYLE III

By: Harold W. Salisbury

Harold W. Salisbury, OBA #12845
2520 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7766

ATTORNEY FOR ADDITIONAL
THIRD-PARTY DEFENDANT
RICHARD COWAN

-and-

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: Claire V Eagan

Claire V. Eagan, OBA #554
Susan L. Jackson, OBA #11365
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR DEFENDANTS/
COUNTERPLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of August, 1989, a true and correct copy of the above and foregoing document was mailed to each of the following with proper postage thereon fully prepaid:

James E. Green, Jr., Esq.
Comfort, Lipe & Green, P.C.
2100 Mid-Continent Tower
401 South Boston Avenue
Tulsa, OK 74103
Attorneys for Plaintiffs,
ORS Corporation, Uentech and
ORS Development Corporation
and Additional Counterdefendants
ORS Canada, Ltd. and EOR Ltd.

William J. Doyle, III, Esq.
2520 Mid-Continent Tower
401 South Boston Avenue
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Attorney for Additional
Counterdefendants, V. E. Goodwin
and Richard Cowan

B. Hayden Crawford, Esq.
Crawford, Crowe & Bainbridge
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Attorneys for Additional
Counterdefendant,
Robert A. Alexander, Jr.

Michael L. Seymour, Esq.
1717 East 15th Street
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Attorney for Additional
Counterdefendants,
Homer L. Spencer, Jr. and Don Eve

Stephen B. Riley, Esq.
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Attorneys for Additional
Counterdefendant, J. L. Diamond

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Attorney for Additional
Counterdefendant, Robert Case

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Attorneys for Additional
Counterdefendants,
John Carl Wood and Michael Rogers

R. Thomas Seymour, Esq.
230 Mid-Continent Tower
401 South Boston Avenue
Tulsa, OK 74103
Attorney for Additional
Counterdefendant, Robert H. Tips

Claire V Eagan

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

AUG -7 1989

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

COLORADO GAS COMPRESSION, INC., a Colorado corporation,

Plaintiff,

vs.

BOB BAKER d/b/a Gasco Products Company,

Defendant.

No. 89-C-252-B

O R D E R

This matter comes on for consideration upon Plaintiff's application for recovery of attorney's fees and costs, filed herein on June 1, 1989. The Court finds attorney's fees and costs should be awarded in the following amounts:

Attorney's fees.....$423.75

Bill of costs.....$195.00

IT IS SO ORDERED this 7th day of August, 1989.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LUC J. VAN RAMPELBERG,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

No. 89-C-326-E

7

O R D E R

The Court has for consideration the Report and Recommendation of the Magistrate filed May 4, 1989. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that the case is hereby dismissed.

ORDERED this 7th day of August, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID RUNNELS,

Plaintiff,

vs.

No. 88-C-1382-B

FARMERS INSURANCE EXCHANGE,
TRUCK INSURANCE EXCHANGE,
FIRE INSURANCE EXCHANGE,
MID-CENTURY INSURANCE CO.,
FARMERS NEW WORLD LIFE INS. CO.,
FARMERS INSURANCE CO., INC.,

Defendants.

O R D E R

This matter comes on for consideration upon the Motion for Summary Judgment filed herein on June 26, 1989, by Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Co., Farmers New World Life Ins. Co. and Farmers Insurance Co., Inc., (hereinafter Farmers or Defendants), the response thereto by Plaintiff, and Defendants' Reply.

The following facts appear to be undisputed or established by competent evidence.[1] The competency of evidence offered in support of a motion for summary judgment is not to be judged on the same basis as evidence which is offered at trial. Securities & Exchange Comm. v. American Commodity Exchange, Inc., 546 F.2d 1361 (10th

[1]Certain documents (copies of letters between the parties, etc.) have been proffered by the parties. Documents filed in support of a motion for summary judgment are to be used to determine whether issues of fact exist and not in order to decide the fact issues themselves. Spatz v. Nascone, 364 F.Supp. 967 (D.C.Pa. 1973), supplemented 368 F.Supp. 352.

Cir. 1976).

(1) Plaintiff and Defendants entered into, in 1979, a contract wherein Plaintiff was to sell, as an independent contractor, insurance policies to be issued by Defendants. The Agency Agreement[2] (hereinafter Agreement) provided, *inter alia*, as follows:

> "I. Nothing contained herein is intended or shall be construed to create the relationship of employer and employee; rather, the Agent is an independent contractor for all purposes.
>
> The time to be expended by the Agent is solely within the Agent's discretion, and the persons to be solicited and the area wherein solicitation shall be conducted is at the election of the Agent.
>
> The Agent shall, as an independent contractor, exercise sole right to determine the time, place and manner in which the objectives of this Agreement are carried out, provided only that the Agent conform to normal good business practice, and to all State and Federal laws governing the conduct of the Companies and their Agents."

(2) Plaintiff, in approximately April, 1986 became employed with Jim Furman Acura in Tulsa selling automobiles, but continued to hold himself out as an insurance agent.

(3) Plaintiff, in approximately September, 1986 moved his insurance agency to his home and operated the agency from this location.

(4) Plaintiff and Defendants' employees experienced

---

[2]Attached to both Plaintiff's Response and Defendants' Appendix.

difficulty in their business relationship due to Plaintiff's new office location, new employment and several other matters related to customer servicing and commercial premium renewals (particularly Tulsa Truck Rebuilders' account which was in dispute as early as 1985).

(5) After a series of meetings and exchanges of memos and letters, Defendants terminated Plaintiff's agency contract, effective December 29, 1987.

Defendants seek summary judgment, maintaining they have an absolute right to terminate the contract (with 90-day notice).[3] The Court concludes such a right, indeed, exists. The issue then isn't a termination right dispute; the issue is denial of future renewals.

Although the contract provides[4]: "No service commissions will be payable to the Agent after termination of the Agreement," the Hall case[5] indisputably injects "future renewals" into the current dispute.

Both Plaintiff and Defendants are acutely aware of the Hall case which involved essentially these same Defendants and an Agency

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[3]The Agreement provides:

> C. This Agreement terminates upon the death of the Agent and may be terminated by either the Agent or the Companies on three (3) months written notice.

[4]Last sentence of Paragraph E.

[5]Hall v. Farmers Ins. Exchange, 713 P.2d 1027 (Okl. 1985).

Agreement identical to the one *sub judice*. In Hall, the Oklahoma Supreme Court reinstated a jury verdict in favor of a terminated insurance agent (Hall). The jury had found that Hall was wrongfully terminated in that the insurance company intended to deprive him of the fruits of his contract renewal commissions thereby breaching an implied covenant of good faith. Punitive damages were awarded.

There are several factual aspects which distinguish the Hall case from the present matter:

(a) For ten years both Hall and Farmers performed to the mutual satisfaction of the other. In the present case some discord existed even before Plaintiff's home officing and new job problems arose.

(b) Hall grossed much more[6] on an annual basis than did Plaintiff and therefore had more to lose when terminated.

(c) Hall was terminated after only several months of acrimony after Hall led a group of other Farmers' agents in protesting what was considered by them to have been the termination without good cause of a fellow Farmers agent. Plaintiff Runnels and the Defendants had a continuing skirmish for several years as each appeared to "build a file."

There are no public policy overtones in the present case and the issue of an unconscionable breach of an implied covenant of good faith would be a matter for jury decision after all the facts of

[6]$42,000 yearly, of which $35,000 were renewal premiums as opposed to present Plaintiff's $13,000 to $20,000.

this case are presented.[7]

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986).

In the case at bar the essential facts, while in little dispute, are capable of conflicting interpretations as to the reasonable inferences to be drawn therefrom. Summary judgment should not be granted if evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions. Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245 (4th Cir. 1967). Particularly is summary

---

[7]The Court is not addressing at this time, the impact of 23 O.S. §9, wherein punitive damages are limited to an amount equal to the amount of actual damages unless the Court shall find

> "[T]here is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply."

However, the Court concludes, under the evidence before it for summary judgment consideration, the Plaintiff faces a difficult task in making such a showing.

judgment inappropriate where the primary issue is one of intent and motive. Romero v. Union Pac. RR., 615 F.2d 1303 (10th Cir. 1980). In this case the motive and intent of Defendants' termination of Plaintiff's agency contract is the issue.[8]

Accordingly, Defendants' Motion for Summary Judgment should be and the same is herewith DENIED.

IT IS SO ORDERED this 7th day of August, 1989.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[8]The Court is not unmindful of Plaintiff's deposition testimony (pp. 307-318), undenied by Defendants, that Plaintiff's old policies were turned over to another agent under an arrangement whereby the new servicing agent received one-half of the renewal commissions and the Company (Defendants) retained the balance.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

PHILLIPS PETROLEUM COMPANY, and Subsidiaries	)	
Plaintiff	)	
v.	)	CIVIL NO. 87-C-408-E
UNITED STATES OF AMERICA,	)	
Defendant	)	

ADMINISTRATIVE CLOSING ORDER

It appearing to the Court that the parties have reached tentative grounds for settlement, this case is hereby administratively closed for a period of six (6) months. If the parties have not notified the Court of a final settlement by that date the case will be set for scheduling conference.

SIGNED this 2 day of Aug, 1988.

/s/ James O. Ellison
UNITED STATES DISTRICT JUDGE

Approved for entry:

D. W. McNEILL
PHILLIPS PETROLEUM COMPANY
710 Plaza Office Building
Bartlesville, Ok 74004
(918) 661-8278

BOONE, SMITH, DAVIS & HURST

By _____
L. K. SMITH
LLOYD G. MINTER
GARY L. MADDUX
500 ONEOK Plaza
100 West 5th Street
Tulsa, Oklahoma 74103
(918) 587-0000

ATTORNEYS FOR PLAINTIFF
PHILLIPS PETROLEUM COMPANY

_____
M. KENT ANDERSON
Attorney, Tax Division
Department of Justice
Room 5B31, 1100 Commerce Street
Dallas, Texas 75242
(214) 767-0293

ATTORNEY FOR UNITED STATES

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES A. FIELDS,

Plaintiff,

v.

LT. DAN CHERRY, et al,

Defendants.

88-C-511-E

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate filed June 19, 1989 in which the Magistrate recommended that the Defendant's Motion to Dismiss be granted and the case dismissed.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate should be and hereby is affirmed.

It is, therefore, Ordered that the Defendant's Motion to Dismiss is granted and the case is dismissed.

Dated this 3rd day of August, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

PAUL R. BUHL and PATRICIA S. BUHL,

Plaintiffs,

vs.

No. 88-C-1384-E

DAVID G. WEATHERS and GRAHAM WEATHERS,

Defendants.

O R D E R

The Court has for consideration the Report and Recommendation of the Magistrate filed April 12, 1989. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be adopted by the Court in part and rejected by the Court in part.

IT IS THEREFORE ORDERED that the Magistrate's recommendation that this matter should be transferred to the Middle District of North Carolina pursuant to 27 U.S.C. §1404(a) is affirmed and adopted by this Court. This action is accordingly transferred to the United States District Court for the Middle District of North Carolina. The Magistrate's recommendation that Defendants' Motion to Dismiss for lack of personal jurisdiction be denied as moot is rejected by this Court. Defendants' Motion to Dismiss for lack of personal jurisdiction is held in abeyance to be considered on its merits by the United States District Court for the Middle District

of North Carolina.

ORDERED this 21 day of ~~July~~ Aug, 1989.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MIDAMERICA FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. SHERIDAN PROPERTIES, INC., a Tennessee corporation; ROBERT J. PHILLIPS; WANDA N. PHILLIPS: JUSTIN LYON; RAYMOND M. BRIGGS and HELEN P. BRIGGS; ERWIN LEE KING and EILEEN L. KING; JAMES O. SHOEMAKER; MELANIE SHOEMAKER; THOMAS C. HARMON; PANTEGO PROPERTIES, INC., an Oklahoma corporation; and CARPETLAND, INC., Defendants, and VIRGYL D. JOHNSON and GREEN COUNTRY APPRAISAL SERVICE, INC., an Oklahoma coporation, Third-Party Defendants.	)	Case No. 88-C-1341-E

FILED

U.S. DISTRICT COURT

ORDER OF DISMISSAL

This matter comes on before me, the undersigned Judge of the United States District Court for the Northern District of Oklahoma on this 4th day of Aug, 1989, pursuant to the Application of the Defendants, Robert J. Phillips and Wanda N. Phillips to dismiss their counterclaim against Plaintiffs with prejudice. For good cause shown, the Court FINDS that the Application should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's Counterclaim against Plaintiff Local America Bank of Tulsa F.S.B., and Federal Savings & Loan Insurance Corporation as Receiver for MidAmerica Federal Savings and Loan Association should be and is hereby dismissed with prejudice.

S/ THOMAS R. BRETT
United States District Judge

IN THE UNITED STATES DISTRICT COURT WITHIN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA.

TINA GALE HUSONG, et vir, Plaintiffs,

-vs-

CHURCHILL TRUCK LINES, INC., a Missouri Corporation, et al, Defendants.

No. 89-C-339-C

DISMISSAL WITH PREJUDICE

Come now the Plaintiffs, TINA GALE HUSONG and PHILLIP E. HUSONG, Wife and Husband, and they voluntarily dismiss the above entitled and numbered cause, with prejudice to any other future cause or causes of action based upon the allegations contained in their original petition filed herein at their cost.

Dated this 8/1/89 day of August, 1989.

Tina Gale Husong
TINA GALE HUSONG and

Phillip E. Husong
PHILLIP E. HUSONG, Wife and Husband
Plaintiffs

READ AND APPROVED:

Tony Jack Lyons
TONY JACK LYONS, OBA #5591

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG -3 1989

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

CLAUDE MILLSAP SR. AND
DOROTHY MILLSAP,

Plaintiffs,

vs.

ORKIN EXTERMINATING COMPANY,
INC.,

Defendant.

Case No. 88-C-682-E

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs Claude Millsap, Sr., and Dorothy Millsap, by and through their counsel, Bruce W. Gambill, and the Defendant, Orkin Exterminating Company, Inc., by and through their counsel Richard A. Paschal, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and hereby stipulate that this case be dismissed with prejudice to the bringing of the another action. It is stipulated by the parties that they shall each bear their own attorney's fees and costs.

DATED this 3 day of August, 1989.

KELLY & GAMBILL

By Bruce W. Gambill
Bruce W. Gambill #3222
P. O. Box 329
Pawhuska, Oklahoma 74056
(918) 287-4185

ATTORNEYS FOR PLAINTIFFS,
CLAUDE MILLSAP, SR. AND
DOROTHY MILLSAP

COMFORT, LIPE & GREEN, P.C.

By Richard A. Paschal

Richard A. Paschal #6927
2100 Mid-Continent Tower
401 South Boston
Tulsa, Oklahoma 74103
(918) 599-1907

ATTORNEYS FOR DEFENDANT,
ORKIN EXTERMINATING COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

EXECUTIVE OFFICE NETWORK, INC., a California Corporation,

Plaintiff,

vs.

GREGORY D. LORSON,

Defendant,

and

APPLIED TECHNICAL SUPPORT,

Garnishee.

Case No. 87-C-966-C

FILED

AUG 2 1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter comes on for hearing this 1st day of August, 1989 upon Application and Affidavit of the plaintiff duly made for judgment by default. It appears that the garnishee herein is in default and the Clerk of the United States District Court has previously searched the records and entered the default of the garnishee. It further appears upon plaintiff's Affidavit that garnishee is indebted to plaintiff in the sum of $250,000.00 with interest at the rate of $65.75 per diem from September 27, 1987, together with costs and an attorney's fee of $304.00, for failure to answer the Postjudgment Wage Garnishment Summons served on it. The Court having heard the argument of counsel and being fully advised, finds that the garnishee is not an infant or incompetent person, and that judgment should be entered for the plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff recover from garnishee the sum of $250,000.00, plus interest at the rate of $65.75 per diem from September 27, 1987, together with costs and an attorney's fee in the sum of $304.00, for all of which let execution issue.

Judgment rendered this 1 day of Aug, 1989.

UNITED STATES DISTRICT JUDGE

Approved:

Camilla J. Lindsey
Counsel for Plaintiff

FILED
AUG 4 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THREE CERTIFICATES OF DEPOSIT: NUMBERED 806909, 806910, and 806911, ISSUED BY THE FIRST NATIONAL BANK & TRUST CO., BROKEN ARROW, OKLAHOMA,

Defendants.

Civil Action No. 89-C-540-B

NOTICE OF DISMISSAL

Plaintiff, the United States of America, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Catherine J. Depew, Assistant United States Attorney, gives notice that the above-styled action is hereby dismissed without prejudice and without costs pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

Respectfully submitted,

TONY M. GRAHAM
United States Attorney

Catherine J. Depew

CATHERINE J. DEPEW
Assistant United States Attorney
3600 U.S. Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of August 1989, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Steven A. Heath, Esq., 515 South Main, Suite 300, Tulsa, Oklahoma 74103, and James F. Bullock, Esq., Pray, Walker, Jackman, Williamson & Marlar, Oneok Plaza, Tulsa, Oklahoma 74103.

Catherine J. Depew
Assistant United States Attorney

CJD:ssg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INDUSTRIAL ELECTRIC ENGINEERING & TESTING COMPANY, Plaintiff, vs. HONEYWELL, INC., Defendant, vs. MID-CONTINENT CASUALTY COMPANY, Third-Party Defendant, vs. JOHN M. PRAKASH and RANI M. PRAKASH, Fourth-Party Defendants.	No. 87-C-906-E

JOINT DISMISSAL WITH PREJUDICE

NOW on this 9th day of January, 1989, by stipulation of all parties to this action, Honeywell, Inc., dismisses with prejudice all claims heretofore asserted in this action. Industrial Electric Engineering & Testing Company dismisses with prejudice all claims heretofore asserted in this action. Mid-Continent Casualty Company dismisses with prejudice all claims heretofore asserted in this action against Honeywell, Inc.

Respectfully submitted,

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ATTORNEYS FOR INDUSTRIAL ELECTRIC ENGINEERING & TESTING COMPANY, JOHN M. PRAKASH and RANI M. PRAKASH

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ATTORNEY FOR MID-CONTINENT CASUALTY COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG - 2 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

GEOFFREY TODD BAKER,

Plaintiff,

vs.

McDONNELL-DOUGLAS CORPORATION,

Defendant.

No. 88-C-879-B

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, McDonnell-Douglas Corporation, and against the Plaintiff, Geoffrey Todd Baker. Plaintiff shall take nothing of his claim. Costs are assessed against the Plaintiff and each party is to pay its respective attorney's fees.

Date, this 2nd day of August, 1989.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

AUG - 8 1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEOFFREY TODD BAKER,)
)
Plaintiff,)
)
vs.) No. 88-C-879-B
)
McDONNELL-DOUGLAS CORPORATION,)
)
Defendant.)

O R D E R

This matter comes before the Court upon Defendant McDonnell-Douglas Corporation's Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56.

Plaintiff began his employment with McDonnell-Douglas Corporation ("MDC") on July 22, 1985. On or about September 21, 1985, Plaintiff suffered an injury to his right knee while working for MDC. Plaintiff filed a worker's compensation claim in early March 1986 after MDC had initially declined to characterize the injury as work related. MDC granted Plaintiff a Medical Leave of Absence from June 5, 1986, until June 29, 1986, so that Plaintiff could have surgery on his right knee. After his medical leave had expired, Plaintiff went to Seattle, Washington whereby he sought additional medical treatment.[1] (Plaintiff's Depo. at p. 77). Plaintiff did not submit a written request to extend his medical

[1]It should be noted that Plaintiff's medical treatment in Seattle, Washington was unrelated to the treatment given by his physician in Tulsa, Oklahoma. Although both physicians treated Plaintiff for a knee injury, Plaintiff's Tulsa doctor did not refer him to the physician in Seattle for additional treatment.

leave of absence beyond June 29, 1986. (Plaintiff's Depo. at p. 42). On August 8, 1986, Defendant mailed a telegram to Plaintiff's last known address advising him that his medical leave had expired on June 26, 1986,[2] and that Plaintiff should contact or report to MDC's medical department by August 13, 1986, or he would be considered to have resigned.[3] Plaintiff did not contact MDC until August 15, 1986, at which time MDC stated it would reconsider Plaintiff's employment status if he could return to Tulsa, Oklahoma by August 18, 1986. Plaintiff had scheduled additional medical treatment during that time period and could not both obtain the treatment and return to Oklahoma. Plaintiff chose to remain in Seattle and returned to Oklahoma in late August 1986. Plaintiff's Oklahoma doctor gave Plaintiff a medical release to return to work on November 19, 1986. When Plaintiff returned to work with his medical release, he was informed his employment had been terminated.

Plaintiff initiated this diversity action pursuant to 85 O.S. §§5-7 to seek redress from Defendant's alleged retaliatory discharge of Plaintiff after he filed a worker's compensation claim. The issues, therefore, are whether Plaintiff's unexcused absence from work was a legitimate, non-discriminatory reason for

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[2]Although the letter stated Plaintiff's medical leave expired on June 26, 1986, Plaintiff's leave did not expire until June 29, 1986. (Exhibit 2 to Plaintiff's Deposition).

[3]For the purposes of this Motion, MDC agrees Plaintiff did not resign, but that it terminated Plaintiff's employment. See Defendant's Brief at p. 11, n.1.

discharging Plaintiff or whether Plaintiff's absence was a mere pretext for Defendant's retaliatory motives because Plaintiff had filed a worker's compensation claim.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, Plaintiff "must establish that there is a genuine issue of material facts...." Plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Title 85, Section 5 makes it illegal for an employer to discharge any employee because he has filed a worker's compensation claim. It is not illegal, however, for an employer to discharge an employee who is unable to return to work at the end of his leave of absence. Pierce v. Franklin Electric Co., 737 P.2d 921 (Okla. 1987). In this instance, Plaintiff's leave of absence was

effective through June 29, 1986. Plaintiff made no attempt to extend his leave of absence beyond June 29, 1986, although a formal leave of absence may be extended upon written application to and receipt of written approval from the Director-Personnel or Designee. (Sections 2(B) and (E) of the Bargaining Agreement between Plaintiff's union and Defendant, attached as Exhibit 5 to Defendant's Motion for Summary Judgment). Plaintiff's only contact with MDC was on August 15, 1986, after he received a letter from MDC advising him his leave of absence had expired on June 26, 1986, and that he would be terminated if he did not contact MDC by August 13, 1986. After August 15, 1986, Plaintiff did not contact MDC or attempt to return to work until he received a medical release from his doctor in Tulsa on November 19, 1986, even though he had returned to Tulsa in late August, approximately three months earlier.[4] (Plaintiff's Depo. at p. 74 and Exhibit 4 attached to Defendant's Motion for Summary Judgment). The Oklahoma Supreme Court concluded:

> "The Act [85 O.S. §5] does not expressly provide injured employees with an excused work absence during their healing period, and we are unable to create such an additional workers' compensation benefit. Accordingly, we hold that the statute does not prohibit the discharge of an employee because he is absent from work, even when the absence is caused by compensated injury and medical treatment."

Pierce v. Franklin Electric Co., 737 P.2d 921, 923-924 (Okla. 1987)

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[4]There is no evidence indicating whether November 19, 1986 was the first date on which Plaintiff was capable of returning to work; however, the issue is of no consequence in light of Pierce v. Franklin.

(emphasis in original). Plaintiff's failure to return to work after his leave of absence had expired, or his failure to seek an extension of his leave of absence, when coupled with his prolonged absence from work without contacting his employer, gave Defendant cause for terminating Plaintiff's employment without violating Oklahoma law.

The remaining issue is whether Plaintiff's worker's compensation claim was a significant factor in Defendant's decision to terminate Plaintiff's employment. A discharge is retaliatory if an employee's participation in one of the activities protected by 85 O.S. §5 is a significant factor in the employer's decision to terminate the employee. Thompson v. Medley Material Handling, Inc., 732 P.2d 461, 463 (Okla. 1987).

> "The Act neither requires the employer to treat a claimant more advantageously than other absent workers nor does it penalize the employer for a discharge motivated by permissible factors."

Pierce at 924. Defendant's permissible factor was that Plaintiff failed to return to work after his leave of absence had expired. Plaintiff has the burden of coming forward with evidence which would establish circumstances giving rise to a legal inference that the discharge was significantly motivated by retaliation for the exercise of statutory rights. Buchner v. General Motors Corp., 760 P.2d 803, 810 (Okla. 1988). Plaintiff has come forward with no evidence, other than Defendant's reluctance to characterize the injury as work related, to meet the threshold requirements imposed by Buchner and Thompson. Therefore, Defendant's Motion for Summary

Judgment is SUSTAINED and the case DISMISSED.

IT IS SO ORDERED, this 2nd day of August, 1989.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUG 2 1989

Clerk, U.S. DISTRICT COURT

ASSOCIATES NATIONAL MORTGAGE CORPORATION,

Plaintiff,

vs.

FIRST SECURITY MORTGAGE COMPANY,

Defendant.

No. 89-C-278-E

DEFAULT JUDGMENT

This matter comes on for consideration on the Motion for Default Judgment filed herein by the Plaintiff. The Court, having reviewed the Motion, notes that the Defendant's default has been duly entered by the Court Clerk and that the time for the Defendant to respond to Plaintiff's Complaint has expired.

IT IS THEREFORE ORDERED that the Plaintiff have and recover judgment against the Defendant, First Security Mortgage Company, in the amount of Two Hundred Seventy-nine Thousand Nine Hundred Twenty and 36/100 Dollars ($279,920.36), together with interest thereon from March 10, 1989, at the rate of ~~8.16~~ 7.75 percent per annum, until paid, together with all costs of this action including reasonable attorneys' fees to be assessed upon the filing of a proper bill of costs and application for attorneys' fees.

ORDERED this 31st day of July, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRANSWESTERN MINING COMPANY, a Nevada corporation,

Plaintiff,

vs.

WAYMON W. BEAN and SHARON A. BEAN, husband and wife, et al.,

Defendants.

Case Number 88-C-1220-B

ORDER OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT FOREST OIL COMPANY ONLY

This matter comes on before the Court upon the joint motion of Plaintiff and Defendant Forest Oil Company for dismissal with prejudice of Plaintiff's claims against Defendant Forest Oil Company only. The Court further finds that Defendant Forest Oil Company has disclaimed any and all right, title, and interest in and to the property which is the subject of this foreclosure action. The Court finds that there is good cause shown for granting such motion and it is, therefore,

ORDERED that the Plaintiff's claims against Defendant Forest Oil Company shall be and are hereby dismissed with prejudice, with Plaintiff and Defendant Forest Oil Company to bear their own costs and attorney's fees herein with respect to the Plaintiff's claims against Defendant Forest Oil Company.

IT IS FURTHER ORDERED that Defendant Forest Oil Company has no right, title or interest in and to the property which is the subject of this action.

IT IS FURTHER ORDERED that this Order of Dismissal is only effective as to Defendant Forest Oil Company and that this Order of Dismissal shall not affect, release, or dismiss the Plaintiff's claims against any of the other Defendants herein.

DATED this 2 day of ~~June~~ August, 1989.

/s/ THOMAS R. BRETT
HON. THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

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Waymon W. Bean and Sharon A. Bean

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOCAL AMERICA BANK OF TULSA, a federal saving bank, f/k/a COMMUNITY FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

MANHATTAN LEASING, INC., et al.,

Defendants.

Case No. 88-C-1333-E

ORDER

NOW on this 13th day of July, 1989, the Pretrial Conference was held before this Court. Plaintiff, Local America Bank of Tulsa, a Federal Saving Bank ("Local America"), appears by and through its attorneys of record, Jones, Givens, Gotcher, Bogan & Hilborne, P.C., by Robert S. Erickson and Michael J. Gibbens; Federal Savings and Loan Insurance Corporation, as Receiver for First Oklahoma Savings Bank, F.A. ("FSLIC"), appears by and through its counsel of record, Fellers, Snider, Blankenship, Bailey & Tippens, by John D. Heatly, and Huffman, Arrington, Kihle, Gaberino & Dunn, by Barry Beasley; Defendant, Manhattan Leasing, Inc., an Oklahoma corporation ("Manhattan"), appears by and through its attorneys of record, Leblang & Hess, by Cynthia Hess; Defendant, Linda Freeman, appears by and through her attorneys of record, Doyle & Harris, by Michael Davis and Steve Harris; the Defendants, Robert Read

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("Read") and Michael Martino ("Martino"), appear not, although duly and properly given notice of this Pretrial Conference. The Defendant, Guaranty National Bank, a national banking association ("Guaranty"), appears not, but concurs with this Order; and the Defendants, State of Oklahoma ex rel. Oklahoma Tax Commission ("OTC"), Longview Lake Association, Inc. ("Longview"), and A. B. Doe and C. D. Doe, a married couple (the "Does"), appear not and have failed to answer or otherwise appear herein. Upon review of the pleadings herein and arguments raised at this Pretrial Conference, the Court for good cause shown FINDS as follows, to-wit:

1. That the Plaintiff, Local America, a/k/a Community Federal Savings and Loan Association, is a federal savings bank duly organized and existing under the laws of the United States of America; that the real property which is the subject of this action is located in Tulsa County, State of Oklahoma; and that this Court has jurisdiction over the subject matter herein and the parties herein.

2. That the Defendant, Manhattan, Read, Freeman, Martino, Guaranty, OTC, Longview and the Does, have been properly served with Summons.

3. That such service was made upon said Defendants more than 30 days prior to the date hereof, and that said Summons and service is regular in all respects.

4. Defendant, Guaranty, has filed its Answer herein.

5. Defendants, Manhattan, Read and Martino have filed their Answer and Amended Answer herein.

6. Defendant, Freeman, has filed her Answer, Counter-claims and Cross-Claims herein.

7. That the Defendants, OTC, Longview and the Does have failed to answer or otherwise plead herein, that said Defendants, have failed to appear at this Pretrial Conference, and therefore the allegations of the Plaintiff's Petition and Amendment to Complaint are therefore deemed to be true, and that default judgment should be entered of record against said Defendants, OTC, Longview and the Does.

8. That the Defendant, Guaranty, has failed to respond to Plaintiff's Motion for Summary Judgment despite proper notice thereof; and said Defendant concurs with this Order by executing the same.

9. That the Court has before it the Motion to Dismiss or in the Alternative Motion for Summary Judgment of FSLIC; the Court finds that the Courter-Claim asserted by Defendant, Freeman, against FOSB is worthless, and accordingly, the same should be dismissed and judgment should be entered in favor of FSLIC.

10. The Defendants, Martino, Guaranty, OTC, Longview and the Does, have failed to appear or be represented at this Pretrial Conference, and due notice of such conference having been duly provided, and accordingly, judgment should

be entered in favor of Local America against said Defendants as prayed for in Local America's Complaint.

11. Defendant, Read, has filed for bankruptcy protection in the United States Bankruptcy Court for the Northern District of Oklahoma, in Case No. 89-01957-W.

12. That the claims of Plaintiff, Local America, against Defendant, Freeman, and the affirmative defenses asserted by Defendant, Freeman, against FOSB remain pending before this Court.

13. That Defendant, Manhattan has failed to set forth a proper defense at this Pretrial Conference and therefore Plaintiff is entitled to a judgment against Manhattan as prayed for in Plaintiff's Petition and Amendment to Complaint.

14. Leblang & Hess shall cause to be file herein a suggestion of bankruptcy of Defendant, Read, and Leblang & Hess shall be ordered and allowed to withdraw as counsel for Manhattan and Read.

15. Final Pretrial will be set for October 20, 1989, at 1:00 o'clock p.m.; exhibits shall be exchanged between Local America and Freeman, and trial briefs and proposed voir dire will be filed on November 1, 1989; and trial between Local America and Freeman will be set for November 20, 1989, at 9:30 a.m.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that FSLIC have and recover judgment against Freeman

upon the counterclaims asserted herein by Freeman against FOSB, and judgment in its favor against Freeman dismissing said counterclaims.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that Local America have and recover judgment in in personam against the Defendant, Manhattan, for the principal sum of $299,576.47, together with interest thereon through June 2, 1989, in the sum of $84,256.52, together with interest thereafter at the rate of 15% per annum which may be adjusted pursuant to the subject Promissory Note, until paid, together with attorney's fees and costs, and together with preservation expenses incurred by Local America, if any, including but not limited to expenses for abstracting, preserving, maintaining and insuring the Mortgaged Property and any and all taxes incurred upon said Mortgaged Property paid by Local America.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that Local America have and recover judgment against the Defendant, Martino, for 10% of all indebtedness due and owing to Local America, including but not limited to any and all principal, interest, attorney's fees and costs and any and all preservation expenses incurred by Local America, including but not limited to expenses accrued and accruing for abstracting, preserving, maintaining and insuring the Mortgaged Property and any and all taxes accrued and accruing incurred upon said Mortgaged Property paid by Local America.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the judgment set forth above in favor of Local America constitutes a lien upon the Mortgaged Property and Personal Property, superior to any right, title interest, lien, claim encumbrance, estate, assessment or equity of the Defendants, Manhattan, Martino, Guaranty, OTC, Longview and the Does, herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the claims of Local America against Freeman and the affirmative defenses asserted by Freeman against FOSB remain pending before this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that Leblang & Hess shall cause to be filed herein a suggestion of bankruptcy of Defendant, Read, and Leblang & Hess shall be ordered and allowed to withdraw as counsel for Manhattan and Read.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the final Pretrial herein shall be held on October 20, 1989, at 1:00 o'clock p.m.; that the exhibits shall be exchanged between Local America and Freeman and trial briefs and proposed voir dire be filed herein on November 1, 1989; and that trial herein between Plaintiff, Local America, and Defendant, Freeman, shall be held commencing on November 20, 1989, at 9:30 a.m.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that of and from and after the time of the sale of the

Mortgaged Property and Personal Property, the Defendants, Manhattan, Martino, Guaranty, OTC, Longview and the Does, and all persons claiming by, through or under them (less and except Linda Freeman) be and they are hereby forever barred and foreclosed of any and all right, title, interest, lien, claim, encumbrance, estate, assessment or equity in and to the Mortgaged Property and Personal Property, with the exception of such interest as may be acquired as purchaser at any Sheriff's sale or any such other sale.

Executed this 31st day of July, 1989.

UNITED STATES DISTRICT COURT
JUDGE

APPROVED:

JONES, GIVENS, GOTCHER, BOGAN &
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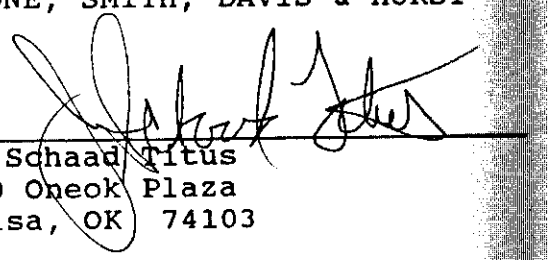

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376-2-1/ras

FILED

AUG 02 1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MORTGAGE CLEARING CORPORATION, a corporation,

Plaintiff,

vs.

VEREX ASSURANCE, INC., et. al.,

Defendants.

No. 87-C-777-P

ORDER GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S PUNITIVE DAMAGES CLAIM AND DENYING PLAINTIFF'S REQUEST FOR ATTORNEY FEES

I. INTRODUCTION

This order arises out of settlement negotiations which partially collapsed and then turned increasingly sour. The plaintiff in this case, Mortgage Clearing Corporation (MCC), after two settlement conferences and lengthy negotiations, reached a settlement with defendant Verex regarding the mortgage default claims which lie at the heart of this lawsuit. As a result of these negotiations, both the defendant Verex and the settlement conference magistrate believed the entire matter had been resolved. Plaintiff's counsel, however, held a contrary view.

While plaintiff's counsel acknowledged settlement of the underlying claims, he contended that the settlement conference had left unresolved (1) plaintiff's $100 million punitive damages claim against Verex, and (2) plaintiff's request for attorney fees. This unusual set of circumstances was fully ventilated in a hearing held on May 9, 1989 before the Honorable Thomas R. Brett,

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the previous judge assigned to this matter.[1]

Despite this problem, the parties proceeded to finalize the settlement on the underlying mortgage insurance claims, and the trial of the remaining punitive damages claim and attorney fees issue was transferred to the undersigned. A scheduling order for the trial of the two remaining issues was entered on May 11, 1989.

The May 11, 1989 scheduling order provided for the filing of dispositive motions on the following issues:

> 1. Whether plaintiff is entitled to any punitive damages under the circumstances of this case; and/or
>
> 2. Whether plaintiff, even if it is entitled to submit the issue of punitive damages to the jury, may recover punitive damages in excess of actual damages.[2]

Order of May 11, 1989 at 5.

Verex filed a summary judgment motion pursuant to this scheduling order on May 19, 1989, and MCC responded on June 1, 1989. A hearing was held on this motion on June 2, 1989, after which the Court entered an order announcing that it would be entering an order granting defendant's motion for summary judgment on plaintiff's bad faith punitive damages claim. Order of June 2, 1989. The Court reserved ruling on plaintiff's attorney fee claim, which arose out of the underlying settlement, and scheduled a hearing for that matter on June 5, 1989.

On June 5, 1989 a hearing was held regarding plaintiff's request for attorney fees related to the settlement monies

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[1]A copy of the May 9, 1989 hearing transcript is attached as Exhibit A.

[2]See 23 Okla. Stat. § 9.

recovered. Subsequent to that hearing, additional briefs were filed by the parties.

This order formally **GRANTS** defendant Verex's motion for summary judgment on plaintiff's bad faith punitive damages claim and **DENIES** plaintiff's request for attorney fees.

II. NATURE OF PLAINTIFF'S CLAIMS

This case was originally filed in Oklahoma state court in Tulsa County. The state court petition filed by MCC sought recovery against Verex upon private mortgage insurance certificates involving 53 pieces of real property. The mortgage loans for the 53 pieces of property were serviced by MCC on behalf of various housing finance agencies, trustees, or lenders.

The case was removed to federal court on September 21, 1987 pursuant to 28 U.S.C. § 1441(a). On December 11, 1987 MCC filed an amended complaint increasing the individually identified claims to 187. The amended complaint additionally included a cause of action regarding 37 certificates of insurance, which were alleged to have been cancelled improperly by Verex.

On December 5, 1988, a Partial Agreed Judgment was entered in this matter after lengthy settlement discussions. That judgment construed various policy terms and provided a vehicle for resolving the parties' disputes regarding insurance coverage and contract interpretation. Although the Partial Agreed Judgment provided for no monetary damages, Verex, in large part due to this judgment, was able to settle either by payment or resolution all of the underlying insurance contract claims which were the subject

(7)

of this lawsuit. These settlements were made with the housing agencies, trustees or other lenders.

As a result of these settlements, and the subsequent controversy evidenced by the May 9, 1989 hearing, the two issues left for trial were plaintiff's alleged $100 million punitive damages claim and plaintiff's attorney fee claim. See Agreed Final Pretrial Order, filed May 17, 1989; Verex' Brief in Support of Motion for Summary Judgment, filed May 19, 1989 at 3; Order of May 11, 1989.

III. SUMMARY JUDGMENT STANDARD FOR ANALYZING PLAINTIFF'S REMAINING PUNITIVE DAMAGE CLAIM

The facts presented to the court upon a motion for summary judgment must be construed in a light most favorable to the nonmoving party. Board of Educ. v. Pico, 457 U.S. 853, 864 (1982); United States v. Diebold, Inc., 369 U.S. 654 (1962). If there can be but one reasonable conclusion as to the material facts, summary judgment is appropriate. Only genuine disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Finally, the movant must show entitlement to judgment as a matter of law. Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 885 (10th Cir. 1985); Fed. R. Civ. P. 56(c).

Although the Court must view the facts and inferences to be drawn from the record in the light most favorable to the nonmoving party, "even under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue

of fact." Burnette v. Dow Chem. Co., 849 F.2d 1269, 1273 (10th Cir. 1988). As stated by the Supreme Court, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The Supreme Court articulated the standard to be used in summary judgment cases, emphasizing the "requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). A dispute is "genuine" "if a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. The Court stated that the question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. "The mere existence of a scintilla of evidence in support of the [party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [party]." Id. at 252.

IV. FINDINGS OF UNDISPUTED FACTS ON PUNITIVE DAMAGES CLAIM

The Local Rules of the Northern District of Oklahoma provide a vehicle for the determination of undisputed facts at the dispositive motion stage. Local Rule 15(B) provides in part as follows:

> A brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section

> that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies. The brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

N.D. Okla. R. 15(B).

An analysis of Verex's motion for summary judgment, filed May 19, 1989 coupled with MCC's response, filed June 2, 1989, reveals the following material facts to be undisputed within the meaning of Rule 56 of the Federal Rules of Civil Procedure and Local Rule 15(B):

> 1. All of the insurance contract claims that are the subject of this suit have been settled, either by payment or other resolution, with the insured housing agencies, trustees, or lenders.
>
> 2. The insured Intervening Plaintiffs have disclaimed any interest in any claims for attorneys' fees and/or punitive damages arising out of the lawsuit and being pursued by MCC herein.
>
> 3. The insured Intervening Plaintiffs have not, in any manner, assigned their claims for attorneys' fees and/or punitive damages to MCC in this case.
>
> 4. In none of the claims and supplemental claims which are the subject of this lawsuit and filed by MCC as servicer, is MCC identified as the insured.
>
> 5. The Court entered a Partial Agreed Judgment on December 5, 1988. No money judgment for damages has

been entered by the Court in this case.[3]

V. CONCLUSIONS OF LAW REGARDING PLAINTIFF'S BAD FAITH PUNITIVE DAMAGES CLAIM

Plaintiff's bad faith punitive damages claim arises out of plaintiff's contention that Verex exercised bad faith in the performance of its obligations under various insurance policies. Christian v. American Home Assur. Co., 577 P.2d 899, 904 (Okla. 1978). Specifically, MCC contends that Verex engaged in a course of conduct which evidenced a wrongful failure or refusal to reasonably settle insurance claims.

Plaintiff's bad faith punitive damages claim in this case should be precluded as a matter of law on two separate grounds. First, MCC is not the proper party in interest to pursue the punitive damages claim in this case for the reason that it is not an insured under the contracts of insurance between Verex and the intervening plaintiffs, housing agencies and trustees. Rather, the record in this case clearly establishes that Verex is merely an agent of the insureds, which include the intervening plaintiffs, housing agencies and trustees. In the face of the disclaimers of punitive damages by the insureds, MCC cannot

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[3]MCC's opposition to Verex's motion for summary judgment makes no attempt to controvert facts 1, 2 and 3 outlined above. MCC does, however, attempt to dispute facts 4 and 5 outlined in this section with conclusory denials and legal arguments. Conclusory denials and unsupported assertions will not defeat summary judgment. See Dart Indus. v. Plunkett Co., 704 F.2d 496, 498 (10th Cir. 1983); Fed. R. Civ. P. 56(e); compare Plaintiff's Brief in Opposition to Motion for Summary Judgment, filed June 1, 1989 at 1-3, and Supplement to Plaintiff's Brief in Opposition to Motion for Summary Judgment, filed June 1, 1989, with Defendant's Brief in Support of Motion for Summary Judgment, filed May 19, 1989 at 3-4.

maintain its own punitive damages claim. Second, under Oklahoma law, MCC is not entitled to recover punitive damages in the absence of an actual damage award.

Central to MCC's claim that it should be entitled to maintain its own punitive damages action against Verex is MCC's contention that it is the insured or the successor/assignee of the original insured. This position is flatly contrary to the position taken by MCC throughout this lawsuit.

In its Amended Complaint, MCC states:

> Plaintiff is engaged in the business of servicing real estate mortgage loans for various lenders. The defendant issued certificate and policies whereby it insured the loans and the mortgages as herein set out. The plaintiff, under the terms of its servicing contracts with said lenders, is obligated to pursue the collection of the benefits of said mortgage insurance by all available means, including suit.

Amended Complaint at ¶ 1 (emphasis added).

In its February 8, 1988, Brief in Opposition to Applicant, BOK as Trustee for Muskogee and Cleveland Co. Housing Authorities' Motion to Intervene as Additional Parties Plaintiff, MCC repeatedly acknowledged that it brought this lawsuit as the agent of the insured trustees and housing agencies. Plaintiff stated:

> . . . Examination of the claims reveals that the delay, failure to pay, and denial of claims, submitted by Mortgage Clearing Corp. on behalf of these and numerous other claimants to Verex were not honored according to the policy provisions and the laws and that principles of bad faith apply . . . .
>
> . . . .
>
> It is conceded that Mortgage Clearing Corp. is legally obligated and entitled to represent the proposed intervenors in this action for the collection of insurance proceeds. The expenses incurred by Mortgage

> Clearing Corp. in servicing mortgages, and filing and processing foreclosure actions on delinquent mortgages were entirely for the use and benefit of the insureds . . . .
>
> . . . .
>
> Whatever interest intervenors have in this matter there is no showing that the interests of these parties is not being adequately represented by the existing plaintiff . . . . These parties have contracted with the plaintiff to do the very thing which it is doing in this action -- to prosecute the claims on delinquent mortgages through mortgage insurance policies. . . .
>
> . . . .
>
> The amount recoverable under the insurance policies is the same regardless of who prosecutes the action. Plaintiff is not the insured under the policies and applicant's contention that plaintiff is seeking to collect monies other and different from those which they wish to collect is incorrect . . . .
>
> . . . .
>
> The plaintiff collects on the policies, under this servicing agreement, forwards the funds to the applicants, under the servicing agreement, and is then reimbursed, under the servicing agreement, for its out-of-pocket expenses . . . .
>
> . . . .
>
> Plaintiff is suing directly on behalf of applicants and many other insureds under approximately 154 identical insurance certificates, not only for principal and interest but also for other losses which are covered by the policies, ... The plaintiff has no direct interest on any claim, not being an insured under any of the certificates of insurance . . . .

Brief in Opposition to Motion to Intervene at 1-3, 6, 9, 14, 15, 19 (Feb. 8, 1988).

Moreover, each time MCC submitted a Claim for Loss to Verex it admitted it was acting as the agent of the insured.

Verex has never disputed that MCC, as the servicing agent of the lenders, housing agencies, and trustees, was authorized to

bring this action on their behalf. However, once Verex settled its claims with these insureds, all of whom have disclaimed any interest in pursuing a punitive damages claim against Verex, Verex promptly drew the line at MCC's attempt to pursue its own $100 million punitive damages claim. Verex's decision is justified under Oklahoma law.

The duty to deal fairly and in good faith with an insured was first articulated by the Oklahoma Supreme Court in Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977). In Christian, the Court stated:

> On appeal, appellant urges us to join with the growing number of jurisdictions which now recognize a cause of action in tort against an insurer for a bad faith refusal to compensate its insured for a loss covered by the policy. This is a distinct tort based upon an implied duty of the insurer to act in good faith and deal fairly with its insured.

577 P.2d at 901 (emphasis added).

The Oklahoma Supreme Court has limited standing to bring a bad faith cause of action against insurance companies to those parties having a contractual or statutory relationship with the insurer. In Roach v. Atlas Life Ins. Co., 769 P.2d 158 (Okla. 1989), the court stated:

> [T]he insurer's duty to deal fairly and act in good faith is limited. It does not extend to every party entitled to payment from insurance proceeds. There must be either a contractual or statutory relationship between the insurer and the party asserting the bad faith claim before the duty arises.

769 P.2d at 161 (emphasis added).

Other recent decisions by the Oklahoma Supreme Court indicate that this Court is limiting, rather than expanding, the

application of Christian. See, e.g., Burk v. K-Mart, Corp., 770 P.2d 24 (Okla. 1989); Rogers v. Tecumseh Bank, 756 P.2d 1223 (Okla. 1988); Hinson v. Cameron, 742 P.2d 549 (Okla. 1987).

Here, MCC has no contractual or statutory relationship with Verex. MCC's contract is with the insured housing agencies and trustees. The insureds contracted with Verex for mortgage loan insurance coverage, and contracted with MCC to service the mortgage loans. Given the absence of any statutory relationship with MCC, Verex owes no Christian duty to MCC.

In apparent recognition of the limitations imposed by the Christian decision and its progeny, MCC has attempted to argue that it is an insured by submitting affidavits indicating that Verex's representatives made oral assurances to MCC to the effect that MCC would be treated as an insured. See Affidavit of Jimmy K. Jones, Exhibit C to Plaintiff's Opposition to Motion for Summary Judgment, filed June 1, 1989. Plaintiff also submitted an affidavit from a former soliciting agent of Verex who stated that it was his "belief" that MCC was an insured. See Affidavit of Charles R. Emrick, Exhibit D to Plaintiff's Opposition to Motion for Summary Judgment, filed June 1, 1989. The Court finds that the dispute raised by these representations and beliefs is neither relevant nor material.

Aside from the previous contrary representations made by MCC in this case, cited above, plaintiff's evidentiary submissions also fly in the face of the Agreed Partial Order filed May 17, 1989. In that order, the parties agreed that:

> The rights and obligations of the parties are governed solely by the insurance policies. [Agreed Pretrial Order at 4, emphasis added].

This final pretrial order is binding upon the parties. Perry v. Winspur, 782 F.2d 893, 894 (10th Cir. 1986); N.D. Okla. R. 17.2(c). Accordingly, plaintiff's efforts to establish its right as an insured by offering evidence outside the policy must be rejected. Moreover, there is no need to resort to such evidence where the insurance policy language is clear. Devine v. Ladd Petroleum Corp., 743 F.2d 745, 748 (10th Cir. 1984).

In the May 17, 1989 final pretrial order, and at the June 2, 1989 hearing, MCC contended that it was the Court's duty to construe the policies as a matter of law. See Agreed Pretrial Order at 8. Consistent with the final pretrial order, the Court has now construed the insurance policies, finding as a matter of law that MCC is not a party to the insurance policy contracts between the various housing agencies, trustees or lenders and Verex, and thus it is not an insured. As previously stipulated to by the parties, the Court finds no need to look beyond the language of the policies, and as a result, MCC's efforts to bolster its claimed status as an insured by resorting to evidence outside the insurance contracts are rejected.

All of the claims for loss are attached as Exhibit D to Verex's Brief in Support of Summary Judgment. A careful reading of these materials, despite disingenuous efforts by MCC to muddy

the waters,[4] reveals that MCC is, and always has been nothing more than an approved servicing agent. Verex did not insure all service agents under the pool policies. To reach such a conclusion, this Court would have to embrace the notion that because of MCC's status as a servicing agent for the lenders, housing agencies and trustees (the insureds), MCC at some point became an insured with a direct insurable interest in the foreclosure expenses and collection of claims. Such a conclusion cannot be drawn from the contracts which the parties have asked the Court to interpret.[5]

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[4]MCC confused the Court by representing that 33 of the claims involved in this case arose under primary policies issued directly to MCC and expressly naming MCC as an insured. Indeed, MCC attached such policies as evidence in support of its claim that it was an insured. MCC, however, neglected to inform the Court that all 33 loans which it had originated were subsequently sold to housing agencies. As a result, MCC is no longer the insured on those 33 claims. This effort at misdirection by plaintiff was disclosed at the June 2, 1989 hearing.

[5]The one provision relied upon by MCC which requires careful analysis is paragraph 9 of the Mortgage Pool Policy, which reads:

> The provisions of this Policy shall inure to the benefit of and be binding upon the Company, and Insured, and any Servicer and their successors and assigns. Where appropriate, all references to the insured shall include any servicer.

(emphasis added).

Although favorable to MCC at first blush, this provision must be read in light of the other provisions of the Mortgage Pool Insurance Policy. A review of these provisions, including the circumstances under which Verex agrees to pay the insured, confirms that it would not be appropriate to substitute Verex in the agreement to pay provisions of the policy. Paragraph 9 cited above has nothing to do with the circumstances now before the Court. See contractual provisions cited at pp. 5-6 of Response of Verex Assurance, Inc. to Plaintiff's Trial Brief in the Issue of

In short, MCC did not consider itself an insured under any of the policies which are the subject of this lawsuit. As an agent of the insured lenders, trustees and housing agencies, MCC can have no greater rights than its principals who have disclaimed any interest in pursuing a punitive damages claim. Such a claim belongs to the insureds and may not be assigned to MCC. See 12 Okla. Stat. 2017(D).

Finally, MCC is not entitled to pursue a punitive damages claim for the additional reason that there has been no award of actual damages. The Oklahoma statute which governs punitive damages expressly states that " the jury, in addition to the actual damages, may give damages for the sake of example . . . ." 23 Okla. Stat. § 9. No reported Oklahoma case has ever held that punitive damages may be awarded in the absence of an actual damage award. Punitive damages simply may not be awarded in Oklahoma unless there is a recovery of actual damages. Moore v. Metropolitan Utilities Co., 477 P.2d 692 (Okla. 1970). Here, there has not been, and will not be, an award of actual damages in favor of MCC against Verex because the claims of the insureds against Verex have been settled. As a result, even if MCC were classified as an insured for purposes of this lawsuit, the $100 million punitive damages action which MCC claims to have exempted from the settlement negotiations could not be pursued because no actual damage award could be recovered.

The Court, in rendering this decision, makes no findings with

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Real Party in Interest, filed June 1, 1989.

THE COURT: Fine, but we've got a hundred million, $150,000 that we didn't discuss and we didn't settle that two-thirds of the settlement parties thought was worked out, was part of the deal.

MR. GAITHER: Well, there are two lawyers here that are in the squeeze between those that don't think so, Your Honor. But the magistrate told us what to discuss.

THE COURT: My percentage is wrong. I should say three-fifths. Three-fifths thought it was being considered.

MR. McCANN: Your Honor, if I may, with respect to your proposal for a June 5 trial date of this matter. First there are a couple of observations I'd like to make for the record.

Not only were there two ten-hour conferences each with the magistrate on two separate occasions but I would suggest that these parties present in the courtroom today have spent a number of multilples of those hours further refining, working out the details. I think Mr. Pate and Mr. McAlister, his colleague, were on the phone with me last week and I believe we finally got to the point where we -- I believe the words were exchanged, well, okay, we understand we've got a deal now, let's go forward and go with it.

As a result of the past six or eight weeks of working on this on an almost daily basis either with my client or with these gentlemen to try and resolve differences and on that

assumption that we had reached this deal, I am now and have been noticed, in fact today it was expected to -- as I walked into this courtroom today this was expected to be my last morning in Tulsa, Oklahoma until June 2nd.

I'm noticed for depositions in Oklahoma City, Chattanooga, Tennessee and New York in a case before Judge Phillips in the Western District which has a discovery one cutoff, which he has already extended once and says we'll never extend again, for a trial July 12th. Ms. Neal, my colleague, who is the only other attorney in my office who has ever worked on this case the past two years, is herself in Chicago most of this week on a Nissan case which goes to trial in Los Angeles on June 12th. She is expected to be in New York half of next week and half of the following week.

Frankly I am at a loss to be able to staff and man this case to get to trial by June 5th with those other commitments. I don't believe under these circumstances that it would be fair for my client to be required to do that. Obviously whatever the Court orders I'm prepared to follow but I do have those other constraints that I wanted to advise the Court about. I also --

THE COURT: We've been rocking along in this thing. When is it set for trial right now?

MR. McCANN: May 22nd, two weeks.

THE COURT: So in other words I'm talking about

passing it a couple of other weeks.

MR. McCANN: I understand. Your Honor, might I say--

THE COURT: When do we try the case? If we let Mr. McCann set the case for trial, when do we try it? You tell me.

MR. McCANN: I could certainly unquestionably I think in this case be ready for a trial in July although Judge Phillips has got me July 10th in Oklahoma City for probably two weeks for trial there.

THE COURT: What do you-all have to say about it?

MR. GAITHER: Your Honor, I go back again to January the 4th understanding that the trial was bifurcated and this is set for a nonjury trial of the nonjury issues on May the -- what is it, the 22nd? And the understanding I had was that if the settlement conference didn't resolve those nonjury issues then you would have a nonjury trial to settle these various claims and then you would decide what to do about the punitive damages and attorney fees later. Now that was my understanding. So that is why I didn't protest when the magistrate handled it the way he did.

THE COURT: Obviously that was my understanding, too, that we were going to try it on May 22nd. Mr. McCann suggests, in view of the fact that the settlement has fallen through that he thought was a settlement and other office problems he's got, that he can't be ready to try it on May

22nd and/or June 5th. Am I right in that or not?

MR. McCANN: Well, I would think with that schedule -- I'm literally -- I'm not even coming back on weekends. I'm just packing a bag and hitting the road for four weeks. So that's a --

THE COURT: What do you have to say, Mr. Lawrence? Mr. Pate?

MR. LAWRENCE: In regard to the trial date July is fine with me, Your Honor. I'm at your pleasure, Your Honor.

In regard to the statements that have been made concerning the status of settlement and the obligation to try the remaining issues, I want to point out that the Housing Agency is the ultimate long-term recipient of residual funds in these programs where the Housing Agency is involved in the cases in this lawsuit.

I have received from the Housing Agency a summary of attorneys fees involved in Verex matters which together with my fees which have been charged in this case, which are not as great as the number I'm saying, but they approximate $300,000.

As Mr. McCann stated a moment ago, he and Bill McAlister agreed that there was a deal struck for settlement of our issues, Oklahoma Housing Finance Agency issues, and I guess Cleveland County issues as well. That was reported to me last Thursday or Friday. We were totally satisfied.

I just want the record to reflect that if Oklahoma

Housing is forced to trial because Verex has withdrawn that agreement because Mr. Gaither pursues these other claims that are not -- we have not applied for attorneys fees in the settlement, we are, like Mr. Pate says, we're ready to walk away on the attorneys fees if we have a settlement. If we don't have a settlement then we're going to pursue attorneys fees. And we think that these two parties will be the ones that ought to have to pay our attorneys fees that ultimately flow to us which is in the neighborhood of $300,000.

THE COURT: I think you definitely ought to include that in your pretrial order in this matter if that's what your position is.

MR. LAWRENCE: We're being held hostage in the status of this case at this time because we thought we were out of the lawsuit as of last -- when was it?

MR. McCANN: Wednesday.

MR. LAWRENCE: Wednesday. That was reported to me Thursday or Friday of last week. Then an immediate following conversation was that it has blown up. Verex is withdrawing their settlement with Oklahoma Housing. We had it settled and they're withdrawing it because they cannot settle with Mr. Gaither.

THE COURT: When is Ms. Neal due back from Chicago?

MR. McCANN: I believe she'll be back in Tulsa on Friday of this week and then she goes to New York Thursday of

next week and is back the Friday before Memorial Day weekend.

Might I make one suggestion that might in the interim -- the Court has already -- I think the time for dispositive motions has run, but with respect to the issue of punitive damages, if the Court would entertain a brief on that subject, I don't know that that might help or assist the resolution of the trial issues in this case.

THE COURT: I think it would be well for you to file trial briefs on that subject, but for us to proceed on that on a motion basis, dispositive or whatever, at this time would be kind of a waste of time. I don't even think it's necessary. Since it's been bifurcated we'll just listen to the evidence and we can decide is it a matter that should proceed on on punitive damages or shouldn't it? It won't take any additional time. No reason to push things aside and decide that on a dispositive motion basis at this time.

MR. McCANN: Your Honor, with respect to one of the other comments made by Mr. Lawrence, with respect to Verex withdrawing their offer, I have not -- my client has not indicated to me that they have withdrawn the offer to the housing agencies. The only dispute which we apparently have remains with respect to the attorney fees and punitive damage claims of Mortgage Clearing Corp. So it may well be that between now and sometime in July we'll pay all -- or whenever the Court sets this matter for trial -- we will have paid all

of the issues so that the only issue remaining for trial, I suppose, might be this attorney fee and punitive damage issue.

MR. LAWRENCE: Your Honor, if that's the case, let's get an order entered and get us out of this lawsuit. We don't want to have to incur the additional expense of going to trial if --

MR. McCANN: I would like to have gotten a settlement and be out of the lawsuit, but that's obviously another problem.

THE COURT: Well, it doesn't sound like to me, at least today, that the punitive damage, attorney fee aspect of this matter is going to go away.

It's very interesting to me, Mr. McCann, your past pronouncement there. As I sat and listened to this lawsuit up until this point it always sounded like to me that it was something that you could sit down with your respective clients and decide on an individual basis how much of a particular claim should be paid, and it sounds like to me you've already done that. So I think for practical purposes and for stipulation purposes, what really remains in this lawsuit sounds like it's this punitive damage business, which you suggest is an issue of law anyway, and this attorneys fee business.

MR. McCANN: Yes, sir.

THE COURT: And we all know how attorney fees work. The odds are that you're not going to question Mr. Gaither's hourly rate. I don't know what it is but the odds are you won't question it. He's a very capable trial lawyer, been at the bar some 40 years now. Out of law school what, '51? '50?

MR. GAITHER: '50 Your Honor.

THE COURT: '50? I'm sorry, I missed it one year. Thirty-nine years at this business. And I don't know what his hourly rate will be, but we'll assume for the sake of discussion he'll be able to line up three or four lawyers who would say it's a reasonable rate in this community. Then the question is, it gets down to the hours or whether he's entitled to a fee in the first place. So with proper stipulations if it takes over two hours to try the attorney fee matter we're wasting time.

If the punitive damage matter is essentially an issue of law, as you state, what remains for trial in this case? Not very much, right?

MR. McCANN: No.

THE COURT: And that being true, frankly I don't see any reason we can't try this lawsuit on June 5th or let Judge Phillips try it on June 6th, irrespective of your schedule. If those are the two principal issues that remain in the case it seems like to me if we spent over -- at the very most a day or two trying the issues that remain, since we're not going to

have to most probably laboriously go through little individual claims here, which is where all the time would be spent, if you all have worked that out, which you seem to suggest that you have, I don't understand what's the big preparation for this punitive damage business, which you suggest is largely a legal argument.

MR. McCANN: Well, I think it's largely a legal argument. I would assume that Mr. Gaither will want to put on evidence with respect to his client's attempt to settle these 155 claims and how each of the 155 claims was presumably mishandled by my client. Then that puts my client on to say, well, here's what we did with respect to each of these 155 claims. Here are the ones that were investigated and for what reason, here are the ones that were denied because they were late and for what reason. It becomes factually a very big -- you're talking about good faith and whether or not we had reasonable differences and so forth.

THE COURT: But when the dollar aspects of it go out, it seems to me on this business of good faith that, you know, spending more than a day on that subject, hearing all of the evidence there is to be presented, would seem to me to be -- we most probably couldn't spend any more time than that on it. And on the attorney's fee business, invariably that will boil down to most probably in the nature of an affidavit trial -- he says I spent this many hours, my fee's thus and so,

hourly charge, et cetera. And you've got to put on an expert or two to contest it.

So I'm having great difficulty with the issues that remain here, frankly, as simplistic as they are, and although I regret that you-all spent ten hours thinking you were settling the lawsuit on a global basis to wind up the whole thing and you weren't, but even that ten hours I'm sure wasn't a waste of time because you had to assemble facts and information and you've got it all categorized in pretty good shape to the point that it sounds like to me that you and your client believe that the money as to each individual claim you've agreed to settle on here is pretty reasonable and that's the way it ought to be worked out.

So with what remains here it seems to me to be appropriate to let you go ahead and make your deal with Mr. Lawrence's client if you seem to think your client is still willing to do that, and as hard as you worked at it, it sounds like to me that would be a reasonable disposition. And then just simply try on June 5th what there is to try on this punitive damage and attorney's fee business.

MR. GAITHER: Would that be a jury trial then, Your Honor? We've asked for a jury trial on the punitive damages.

THE COURT: We're going to have a trial as to whatever there is to hear to determine whether or not punitive damages are applicable in this case.

MR. GAITHER: In other words it will be a preview of the evidence?

THE COURT: Right.

MR. GAITHER: We might be able to save a lot of time if we just submitted a resume of the evidence in documentary form and in statement form for you to consider, and then you could decide whether or not we're entitled to a jury trial on it.

THE COURT: That's the punitive damages -- I mean that's the summary judgment approach that Mr. McCann, as I understand it, was talking about a moment ago, isn't it?

MR. GAITHER: Well, maybe. I don't know. I'm somewhat confused.

MR. McCANN: If he wants to submit that question on stipulated facts and information. Of course I don't know if he'll stipulate to the facts that I've got on the subject as well, but that's fine with me.

THE COURT: Can that be submitted on stipulated facts?

MR. GAITHER: No, I don't think it can, but it -- well, Your Honor, we've got 150 claims that payment was delayed one year, a year and a half, six months, when the contract required they be paid in 30 days.

It looks to me like this is imposing an extra burden on the Court to hear this twice. That's all I'm thinking

about. It looks to me like that's a nonjury trial. If our evidence is insufficient there would be a directed verdict. But we're confident that we have plenty of evidence. It's a gross case of bad faith.

THE COURT: Actually as far as Judge Phillips is concerned, he's going to be here on the 5th and he can empanel a jury and hear it as well as not. I take it you do agree the attorney's fee question would be one for the Court.

MR. GAITHER: Yes, sir.

THE COURT: It sounds like to me, Mr. McCann, in spite of your schedule, by passing this matter two weeks from the 22nd to the 5th and just presenting the punitive damage business to the jury and with the understanding that the attorney's fee business will be presented nonjury, no reason the attorney's fee -- as soon as the jury hears the punitive damage business let Judge Phillips hear the attorney's fee issue while the jury is out as far as that's concerned.

All this is on the assumption that the individual claim aspect of it has been settled. If it's not, that will be tried as well on the 5th. I take it if your client stays hitched on the individual claim settlement, Mr. Lawrence's request that it be concluded on that basis and his client be let out, the only thing that remains is Mortgage Clearing's punitive damage alleged claim coupled with the attorney's fee is all that remains. Is that essentially correct?

MR. McCANN: That would be it as far as I --

THE COURT: What is your understanding of the likelihood of that being the posture of the case come June 5?

MR. McCANN: I will recommend it to my client, Your Honor. They are pretty upset about where they find themselves right now, thinking that they had settled the entire case, and I'll try and control them.

THE COURT: I think it's reasonable to pass this matter from the 22nd of May, and Judge Phillips is going to be here on the 5th and we'll go ahead and try it on June 5th before him.

What are your dates now that I can help you with on pretrial order, et cetera, and --

MR. GAITHER: Your Honor, if I --

THE COURT: And obviously it ought to be -- before you file this pretrial order it ought to be understood is the matter settled on the individual claims or is it not? If it's not, it will be understood that that will have to be tried at some point. Then we have the punitive damage business and then we have the attorney's fee business.

I think when Judge Phillips is here starting the 5th, as I understand it he's going to have an entire week to devote to the matter so there isn't any reason that whatever is to be tried just let him try it, period -- jury, nonjury, the whole bit. The part the jury needs to hear, there they are. When

they're gone the nonjury part of it can be tried including any claims, individual claims on the basis of the merits, and if they're going to be tried nonjury he can try those to start with on nonjury. He can bring in his jury on Tuesday or Wednesday to try the punitive damage if there is anything to try on punitive damages. It sounds like to me that's the proper way to proceed.

What are the current dates you have that you're functioning under? Let me shift those with the June 5th date in mind.

MR. GAITHER: Your Honor, findings of fact and conclusions of law were to be submitted on May 15th, nonjury trial May 22nd. Those are the only dates except the pretrial order.

THE COURT: What was the pretrial order date?

MR. GAITHER: It was Friday, it was the 5th.

THE COURT: Last Friday?

MR. GAITHER: Last Friday, yes, sir.

THE COURT: That hasn't been filed yet?

MR. GAITHER: No, sir.

THE COURT: All right. You ought to get that pretrial order on file. Let's see, today is what, Tuesday or Wednesday?

THE CLERK: Tuesday, the 9th.

THE COURT: Tuesday. You ought to get that pretrial

order on file by a week from this coming Friday, which will be what date, Howard?

THE CLERK: The 19th.

THE COURT: By May 19th. That will give you ten days to get that shaped up. It will also give you ten days to determine whether the individual claim aspect of this thing has been worked out or not. If it has not been, it should be so included in the pretrial order along with the punitive damage and pretrial aspect of the matter. If it hasn't been worked out, whatever, Mr. Lawrence, whatever, Mr. Pate, you gentlemen and your clients wish to reserve concerning claims or contentions against Mortgage, just put it in there so there is nothing secretive about that.

On that date of the pretrial order of May 19th you should also premark all your exhibits and make sure all of those are exchanged so there won't be any secrets about any documents. I take it on the punitive damage aspect of the matter there will probably be documents involved in it but I would assume if punitive damages is the sole issue to be tried of a factual nature there would probably be a lot less documents than if there is a trial on the merits of these various claims. But I'll leave that up to you folks. Whatever issues remain, make sure you exchange all those documents.

As to the merits of the matter, if there is going to

be a trial on the merits of the claim aspect of the matter, if it's set for June 5th for trial as it is on that Monday, on the 29th of -- it would be the 30th, the 29th is a holiday, isn't it, Howard?

THE CLERK: Yes, sir.

THE COURT: On the 30th, if there are any factual matters to be tried to a jury, the suggested instructions should be filed on May 30th.

Also if there are any individual claim aspects of the matter to be tried commencing on the 5th as well, maybe you-all can get together. If there are going to be individual claim aspects of the matter to be tried, that should be certainly spelled out in the pretrial order. And as to the nonjury parts of it you ought to file findings of fact and conclusions of law likewise on the 30th.

And I'll simply sit down with Judge Phillips and tell him how the matter is contemplated to be handled as far as either nonjury or the jury aspects of the matter and it's conceded that the attorney's fee aspect of it would be nonjury and so there should be findings of fact and conclusions of law filed on the 30th in reference to the attorney's fee aspect of the matter as well.

It would likewise seem to be appropriate that on the 30th that the positions on the attorney's fees as to the number of hours, the hourly rate and the details concerning

the number of hours should likewise be spelled out by affidavit or otherwise to be made a part of the pretrial order, also as part of the findings of fact and conclusions of law so there won't be any surprises about the attorney's fee issues as to the amount claimed as well as the number of hours and the details supporting those hours. I take it you've got all that on a computer someplace, Mr. Gaither?

MR. GAITHER: Yes, sir.

THE COURT: Have you by any chance furnished that to the other side?

MR. GAITHER: No, sir. We're not through yet so I haven't had any reason to.

THE COURT: Of course, I think it would be well before we actually start with the trial, so they'll have an understanding of what the claim is, what they're dealing with and what the backup for it is, it would seem to me to be appropriate at least to that point to supply them with that backup as exhibits that the pretrial order will allude to so you can in effect say we're asking for X dollars per hour, to this juncture we're asking for a total of so many dollars attorney's fees based on so many hours of so many associates and partners and blah-blah-blah so they'll know exactly what you're talking about since that's part of the exhibits that they're ultimately going to be entitled to under your attorney's fee claim.

Any trial brief that anyone wishes to file, you may do that on May 30th as well, particularly, as Mr. McCann suggested, I think a trial brief on the issue of punitive damages would be quite helpful to Judge Phillips.

I do not think a trial brief will be necessary on any issue of the reasonableness of an attorney's fee. I think if you wish to file a trial brief on the entitlement to attorney's fees in the first instance it would be helpful to the Court. But since the Court is quite familiar nowadays with such cases as the Burks case as well as these other cases like Oliver Sports Center and Ramos v. Lamm and Hensley v. Eckerhart, the federal cases on attorney's fees, we're all pretty well familiar with the issue of how you determine reasonable attorney's fees and the backup necessary for it. I think a trial brief on the entitlement to attorney's fees in the first place would be helpful to the Court.

Anything else here that we need to schedule?

It sounds like to me, I take it from what I've heard, the way it's going to shake out by a week from Friday is most probably what remains to try in this lawsuit is the so-called alleged punitive damages and the so-called alleged attorney's fee of Mortgage Clearing, right?

MR. McCANN: Yes, Your Honor.

THE COURT: Is that you gentlemen's understanding as well?

MR. PATE: Yes, Your Honor. I'm hopeful we'll get to that point from our client's perspective. They're willing to accept --

THE COURT: Well, as I understand it, your client is ready to go.

MR. PATE: Yes, sir.

THE COURT: The question is whether Verex will stay in the boat as to the individual claim aspect of the trial.

MR. PATE: Yes, sir.

THE COURT: And it looks like they probably will.

MR. PATE: I hope they will.

THE COURT: But if they won't, Judge Phillips will be here to help unravel that on June 5th.

Anything else that we need to discuss here? Any other dates that we need to agree on or try to work out?

MR. LAWRENCE: Your Honor, it was my understanding -- I want to make sure I'm correct in this -- that we will have an answer from Verex on the individual claims before the pretrial order is due?

THE COURT: That's right, because if you don't it's going to be presumed that those are still dangling, and when you prepare the pretrial order all parties are going to have to join in what are the factual and legal issues in reference to those individual claims?

But it sounds like -- the reason I wanted to give you

some additional time on that, it sounds like to me between now and ten days Mr. McCann will know does that remain a disputed area in the lawsuit or not? From what I've heard here, it probably will not, that at least they're pleased with that aspect of the settlement although they didn't bargain for the idea they were going to have to defend against a continuing hundred million dollar case, or a claim anyway.

On the punitive damage aspect of the case, Mr. Gaither, assuming you get there ultimately, that there is a fact question, I am rather confident, and you should draw your pretrial order accordingly, that one aspect of the punitive damage phase of the case that probably should be bifurcated would be the net worth of the defendant. By that I mean I take it at some point after each side has rested and the jury has been instructed in phase one of the punitive damage case, they will be submitted an interrogatory the gist of which will say -- using language in the initial instructions -- do you conclude the conduct of the defendant Verex would be characterized as willful, malicious, wanton, blah-blah-blah, whatever the legalese on that subject is supported by the case law. Yes, no. If they answer that question "no," that ends it for punitive damages. If they answer that question "yes," then they would come back for phase two of the punitive damage trial at which time you would be permitted -- and I suppose the defendant would be permitted to produce as well -- any

evidence that either side wishes to produce bearing on the amount of punitive damages such as net worth.

What are your thoughts on that?

MR. GAITHER: I think you're right. There is another way it could be handled. The Court could just wait until he hears the evidence and decides that he's going to allow it to go to the jury and then he could let us put that on. I would think that would be a simpler way to do it. In other words we wouldn't put it on --

THE COURT: The problem with that is and the reason I never do it that way --

MR. GAITHER: It might influence the jury.

THE COURT: It may influence the jury. And I might add I've been in cases where the defendant had a negative net worth. They weren't worth a quarter, they owed a lot more than assets they had. In other words, they were insolvent. And I didn't let them introduce that in phase one.

MR. GAITHER: I think you're right, Your Honor. I hadn't thought it out. The bad faith cases I've tried I didn't introduce any such evidence so it never did come up, but --

THE COURT: Well, and you may not in this one. I don't know. But when you're talking in terms of a hundred million dollars I'm assuming you think or you have some reason to believe that Verex has got scads of net worth. I don't

know whether Verex is worth a dollar or a hundred billion dollars. I have no idea. So I'm assuming you've got something in your mind that leads you to think that you would probably try to proceed with some sort of net worth proof here. I assume you do or you wouldn't be talking about a hundred million bucks, because if they're only worth a million, for instance, to talk about a hundred million is a little specious. What do you know about that?

MR. GAITHER: I'll probably have some evidence of that.

THE COURT: Do you know at this time anything about Verex and its --

MR. GAITHER: They have more than a hundred million.

THE COURT: Do they?

MR. GAITHER: They have enough to pay that and that's all I'm asking.

THE COURT: Of course, you also get into problems in these punitive damages cases, you know, of what's reasonable under the circumstances. I had a case out here about a year or two ago where the bank had a net worth of about two million bucks, Skiatook Bank. The jury brought back a verdict against them of punitive damages of $500,000. Well, is 25 percent of the net worth of a defendant, is that reasonable in punitive damages? I concluded it wasn't and cut it back to about 75,000 bucks, I might add. So, you know --

MR. GAITHER: I'm glad you're going to be on vacation, Judge.

THE COURT: If they're worth a hundred million and it goes to the jury and the jury grants them a hundred million punitive, as I understand these facts, that would stand up not very long, not very long. So I take it in any prayer for punitive damages to a jury -- I mean it's just not a matter of having your secretary sit around there and bang on zeros on a typewriter. That may be plaintiff's counsel's concept of it but it isn't mine and I don't assume it will be Judge Phillips'. So at some point in time, if you're going to pursue this punitive damage claim, as you seem to indicate you're serious about, I take it at some point in time that figure ought to be scaled down to the maximum that the Court would permit to stand based on the net worth of the defendant. And I don't know, I don't know what you're going to --

MR. GAITHER: I'll review our complaint, Your Honor, and our prayer for damages. There are other criteria involved in determining what's a reasonable amount and a proper amount of exemplary damages.

THE COURT: Surely, surely.

MR. GAITHER: A whole list of them.

THE COURT: Surely. But in these "business fraud" cases they're a little different than the intentional tort matters in terms of punitive damages.

But anyway I think you need to be thinking about all those things. But as I understand it, you do think that you want to offer some evidence concerning net worth.

MR. GAITHER: Probably so, Your Honor. And I think the Court's suggestion as the way to handle it is a proper one.

THE COURT: In your pretrial order include that bifurcation approach in there. I take it you would agree that if the case were to go to a jury on punitive damages the interrogatory approach would be the proper way to go at phase one followed by a dollar amount based on whatever the evidence in phase two is, supported by the interrogatory answer of the jury that the conduct should be characterized as willful, wanton, malicious.

MR. GAITHER: That sounds all right to me. I hadn't really thought about that. I'm glad -- I think you're right--

THE COURT: The reason I'm wanting to kick it around here, I think all this ought to be included in the pretrial order as to this phase one, phase two --

MR. GAITHER: We'll do that. We'll put that in the order.

THE COURT: Mr. McCann, of course, starting with the proposition that you say as a matter of law punitive damages is not involved and shouldn't be, but assuming that through some quirk of fate the judge concludes after all the evidence

is in that there is an issue here for the jury to pass on on the issue of punitive damages, do you agree with the bifurcated approach that I've outlined?

MR. McCANN: Yes, Your Honor.

THE COURT: Of the interrogatory followed by any evidence on net worth perhaps.

MR. McCANN: Yes, sir.

THE COURT: Or any evidence you might have as to lack of net worth or lack of ability to respond in punitive damages, or what would be a reasonable sum.

MR. McCANN: That seems to be appropriate.

THE COURT: Well, include that in your pretrial order if you would.

Is there anything else for us to discuss here? If not, we'll pass the word on to Judge Phillips. And be sure and get your pretrial order here on file by the 30th because on the 30th I'll want to pull that and personally go over it with Judge Phillips so he'll be apprised of where we're going on June 5th before I get out of here. If there is nothing else, you may be excused. Thank you.

MR. GAITHER: Thank you, Your Honor.

(PROCEEDINGS CLOSED)

A TRUE AND CORRECT TRANSCRIPT

CERTIFIED:_____

Beebe Caslavka
United States Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MORTGAGE CLEARING CORPORATION, a corporation,

Plaintiff,

vs.

Case No. 87-C-777-B

VEREX ASSURANCE, INC., an insurance company,

Defendant,

and

OKLAHOMA HOUSING FINANCE AGENCY, and BANK OF OKLAHOMA, N.A., as successor to Fidelity Bank, N.A., Trustee for Oklahoma Housing Finance Agency,

Intervening Plaintiffs.

PARTIAL AGREED JUDGMENT

This matter came before U.S. Magistrate Jeffrey S. Wolfe on October 20, 1988, for a settlement conference. Plaintiff, Mortgage Clearing Corporation ("MCC"), was present by and through its representative, Jimmy K. Jones and its attorney, Jack I. Gaither; Intervening Plaintiff, Oklahoma Housing Finance Agency, was present by and through its representative, Bishop Alonzo Ponder and its attorney, Jack Lawrence; Intervening Plaintiff, Bank of Oklahoma, N.A., Trustee, was present by and through its representatives, Marge Mathes and Bob Clark, and its attorneys, Collier H. Pate and William C. McAlister; and Defendant, Verex Assurance, Inc., was present by and through its representative, Harold J. Lessner and its attorneys, John H. Peiss, James P. McCann and Kathy R. Neal. Hereinafter, the Plaintiff and Intervening

EXHIBIT B

Plaintiffs are referred to as the "Claimants" unless specifically referred to individually. The Court has had an opportunity to review and examine the Primary Master Policy and the Mortgage Pool Insurance Policy, both of which are at issue in this case, specimen copies of which are attached hereto as Exhibits "A" and "B," respectively, and incorporated herein by reference. Having heard the arguments of the parties and being advised in the premises, the Court finds as follows with respect to the issues raised by the parties:

1. Verex Assurance, Inc. ("Verex"), shall, in settling otherwise valid claims submitted to it by MCC, pay a reasonable attorney's fee for the services performed in the liquidation process (i.e. foreclosure or deed-in-lieu of foreclosure), including the claims submitted to Verex which are involved in this lawsuit, according to the following agreed schedule:

A. Tulsa County: All judicial procedures as necessary, including appearances at Judgment, Sheriff's Sale and Confirmation of Sale at the amount of $750.00, plus $50.00 for each defendant not the owner of the property, and $200.00 for each additional appearance for Special Hearings, Depositions and Bankruptcies.

B. Tulsa County, Deed in Lieu of Foreclosure: $350.00.

C. Outside Tulsa County: All judicial procedures as necessary, including appearances at Judgment, Sheriff's Sale and Confirmation of Sale at the amount of $1,200.00, plus $50.00 for each defendant not the owner of the property, and $350.00 for each additional

appearance for Special Hearings, Depositions and Bankruptcies.

D. Outside Tulsa County, Deed in Lieu of Foreclosure: $500.00.

Future claims for attorney's fees that include charges for legal services provided by Law Associates, Inc. and billed according to such schedule shall not be denied. Claims for attorney's fees involved in this action, for services performed by Law Associates, Inc., that exceed the foregoing schedule of charges shall be recalculated and paid according to the schedule. All attorney's fees properly claimed by MCC shall be paid, if otherwise in accordance with the foregoing schedule, regardless of the relationship between the individual attorney or law firm performing the services and the insured or its servicer.

2. Although there are no outstanding claims for reimbursement of title insurance policy premiums in this lawsuit, Verex is not required with respect to claims submitted after the effective date of this order under paragraph 12 of the Primary Master Policy or any mortgage pool insurance policy to reimburse Claimants for title insurance policy premiums unless such a policy has been specifically requested by Verex. Additionally, Verex, in its sole discretion, may waive the obtaining of a title insurance commitment. Submission of a copy of the Sheriff's Deed or Mortgagor's Deed in Lieu of foreclosure shall be, for initial claim purposes, satisfactory evidence of Merchantable Title as provided in the policies. In the event a reasonable and valid objection to merchantability is made at the time of sale of the property, the

insured under the Primary Master Policy must either satisfy such objection or furnish a Title Insurance Policy insuring against loss by reason thereof; provided, however, such policy shall be at no cost to Verex and, in the event such policy cannot be provided, Verex shall not pay interest accruing from the date of the proposed closing and the date the title is cleared.

3. For the claims involved in this lawsuit and any claims which are presented by Claimants to Verex for approval and payment in the future upon defaults occurring after the effective date of this partial agreed judgment, the amount of loss payable by Verex to Claimants pursuant to paragraph 5(c) of the Mortgage Pool Insurance Policy and paragraph 11 of the Primary Master Policy shall include accumulated unpaid interest at the contractual rate (exclusive of late charges and penalty rates) computed to the date the check for the loss payable is made and executed by Verex, except as indicated in paragraph 4 below. Further, Verex shall mail the check representing the approved loss payable to Claimants on the same day it is made and executed. In the event Verex fails to do so, Claimants may file a supplemental claim for additional accumulated unpaid interest at the contractual rate for the period of time between the day the check for the loss payable is made and executed and the day it is mailed, which claim shall be paid, if valid.

4. Paragraph 12(b) of the Primary Master Policy provides that any claim payment due to Claimants shall be payable within thirty (30) days after receipt of the claim and all supporting documents as may be reasonably required by Verex. Verex presently

does not pay Claimants under the Primary Master Policy for interest that accumulates during this thirty (30) day period. Verex shall not pay Claimants under the Primary Master Policy for the interest which accumulated during the thirty (30) day period with respect to the claims involved in this lawsuit and any claims presented to Verex by Claimants for payment in the future upon default occurring after the effective date hereof. Verex shall, however, pay the interest on the portion of the claim covered by the primary mortgage insurance, which accumulated during the thirty (30) day period, under paragraph 5(c) of the Mortgage Pool Insurance Policy with respect to the claims involved in this lawsuit and any claims presented to Verex by Claimants and approved for payment in the future. This order shall not apply to any supplemental claims filed with Verex for defaults on mortgage loans occurring in the past and not a part of this suit.

5. Mortgage insurance premiums and renewal premiums shall be paid to Verex when due. Claimants may pay said premiums from any available mortgage insurance escrow balance on the property involved, but in the event there is no mortgage insurance escrow balance available, Claimants are nevertheless liable for payment of the annual premium on the appropriate due date. Any renewal premiums which have been paid by Claimants prior to the claim filing date shall be refunded by Verex based upon the Short Rate Cancellation Schedule attached hereto as Exhibit "C," and incorporated herein by reference.

IT IS SO ORDERED this 5 day of Dec, 1988.

Thomas R. Brett
United States District Judge

APPROVED AS TO FORM AND CONTENT:

MORTGAGE CLEARING CORPORATION

By: Jimmy K. Jones
Jimmy K. Jones

Its: President

and

Jack I. Gaither
Attorney for Mortgage Clearing Corporation, Plaintiff

OKLAHOMA HOUSING FINANCE AGENCY

By: _____
Bishop Alonzo Ponder

Its: Chairman

and

LAWRENCE, ELLIS & HARMON

By: _____
Jack Lawrence, Attorney for Oklahoma Housing Finance Agency, Intervening Plaintiff

BANK OF OKLAHOMA, N.A., TRUSTEE FOR OKLAHOMA HOUSING FINANCE AGENCY

By: _____
Marge Mathes

Its: _____

IT IS SO ORDERED this ____ day of _____, 1988.

_____
Thomas R. Brett
United States District Judge

APPROVED AS TO FORM AND CONTENT:

MORTGAGE CLEARING CORPORATION

By:_____
Jimmy K. Jones

Its: President

and

_____
Jack I. Gaither
Attorney for Mortgage Clearing
Corporation, Plaintiff

OKLAHOMA HOUSING FINANCE AGENCY

By:_____
Bishop Alonzo Ponder

Its: Chairman

and

LAWRENCE, ELLIS & HARMON

By:_____
Jack Lawrence, Attorney for
Oklahoma Housing Finance
Agency, Intervening Plaintiff

BANK OF OKLAHOMA, N.A., TRUSTEE FOR
OKLAHOMA HOUSING FINANCE AGENCY

By:_____
Marge Mathes

Its:_____

IT IS SO ORDERED this 5 day of Dec, 1988.

Thomas R. Brett
United States District Judge

APPROVED AS TO FORM AND CONTENT:

MORTGAGE CLEARING CORPORATION

By: _____
Jimmy K. Jones

Its: President

and

_____
Jack I. Gaither
Attorney for Mortgage Clearing Corporation, Plaintiff

OKLAHOMA HOUSING FINANCE AGENCY

By: Alonzo J Ponder
Bishop Alonzo Ponder

Its: Chairman

and

LAWRENCE, ELLIS & HARMON

By: Jack K Lawrence
Jack Lawrence, Attorney for Oklahoma Housing Finance Agency, Intervening Plaintiff

BANK OF OKLAHOMA, N.A., TRUSTEE FOR OKLAHOMA HOUSING FINANCE AGENCY

By: Marjorie Mathes
Marge Mathes

Its: Vice President & Trust Officer

BANK OF OKLAHOMA, N.A., TRUSTEE FOR CLEVELAND COUNTY HOUSING FINANCE AUTHORITY

By: Robt W. Clark
Bob Clark

Its: Vice President + Trust Officer

and

PATE & PAYNE

By: William C. McAlister
Collier H. Pate
William C. McAlister
Attorneys for Bank of Oklahoma, N.A., Trustee, Intervening Plaintiff

VEREX ASSURANCE, INC.

By: _____
Harold J. Lessner

Its: Executive Vice President

and

DOERNER, STUART, SAUNDERS, DANIEL & ANDERSON

By: _____
James P. McCann
Kathy R. Neal
Attorneys for Verex Assurance, Inc., Defendant

BANK OF OKLAHOMA, N.A., TRUSTEE FOR CLEVELAND COUNTY HOUSING FINANCE AUTHORITY

By: _____
Bob Clark

Its: _____

and

PATE & PAYNE

By: _____
Collier H. Pate
William C. McAlister
Attorneys for Bank of Oklahoma, N.A., Trustee, Intervening Plaintiff

VEREX ASSURANCE, INC.

By: _____
Harold J. Lessner

Its: Executive Vice President

and

DOERNER, STUART, SAUNDERS, DANIEL & ANDERSON

By: _____
James P. McCann
Kathy R. Neal
Attorneys for Verex Assurance, Inc., Defendant

Verex Assurance, Inc.
150 E. Gilman Street/Box 7066
Madison, WI 53707
Telephone 1-800-356-8080
1-800-362-8070 (within WI)

Master Policy

A subsidiary of
The Greyhound Corporation

SPECIMEN

VEREX

Agreement

Verex Assurance, Inc., Madison, Wisconsin (a stock company called the company) agrees to pay

Master Policy Number

(Hereinafter Called The Insured) in consideration of the premiums to be paid by the Insured as specified in the Certificate, and in reliance upon the statements made in the Application submitted by the Insured, any loss sustained by reason of the default in payments by a borrower as hereinafter set forth, subject to the following conditions:

Conditions

1. Definitions — as used in this policy, the term —

(a) Borrower shall mean the person or persons, firm or corporation to be designated as such on the face of the Certificate.

(b) The real estate shall mean the real property described on the face of the Certificate, and shall include alienable rights of ingress and egress and access to water, sewer, and utility facilities as may be required for the reasonable use of the real estate.

(c) Loan shall mean the indebtedness of the borrower to the Insured in the amount and to be repaid over the period as identified on the face of the Certificate, which is evidenced by a note, bond, contract, mortgage or other instrument, and payment of which is secured by a mortgage as herein defined.

(d) Mortgage shall mean any mortgage, deed of trust, bond, contract, note or other instrument creating a first lien upon real estate as security for repayment of the loan in accordance with applicable local laws.

(e) Two (2), four (4), six (6) or nine (9) months in default shall mean the failure of the borrower to have made monthly loan payments when due, so that sums equal to the aggregate of two (2), four (4), six (6) or nine (9) such monthly payments are delinquent.

(f) Proceedings to Acquire Merchantable Title shall mean any practical legal remedy required or permitted after default under applicable local laws to vest in the Insured merchantable title as defined herein, including, but not limited to, foreclosure by public or private sale, and voluntary conveyance from the borrower.

(g) Merchantable Title shall mean ownership of the real estate free and clear of all liens and encumbrances excepting only (i) the lien of current general real estate taxes not yet due and payable; (ii) recorded easements for public utilities, recorded building restrictions, if any, and the effect of building laws or regulations, with which the improvements on the premises comply and which do not impair the use of the premises and the improvements thereon for their intended purposes; and (iii) such minor imperfections of title as would not render the same from being readily marketable and freely transferable.

(h) Satisfactory Evidence of Merchantable Title shall mean a title insurance company's commitment to insure that merchantable title is vested in the Insured or a grantee to be named; or opinion or certificate of any attorney approved by the Company, directed to the Company, affirming that the Insured is vested with merchantable title to the real estate, together with an abstract of title or comparable title evidence generally acceptable by purchasers of real estate in the area.

(i) Applicable Local Laws shall mean the laws, ordinances, codes and/or regulations applicable in the jurisdiction in which the real estate is located and which pertain to the subject in connection with which the term is used.

2. Application and Commitment — The Insured shall furnish the Company with an Application in connection with each loan for which coverage under the policy is desired, on forms furnished and with requirements prescribed by the Company. Approval of the Application shall be at the discretion of the Company and shall be in the form of a Commitment prescribing the terms of the coverage.

3. Notice and Certificate — Within five (5) days after consummation of the loan transaction the Insured shall forward notice thereof to the Company, together with the premium, and the Company shall immediately issue and forward a Certificate to the Insured, binding the Company according to the terms and conditions of the Commitment and of this policy.

4. Effective Date; Policy Period; Renewal — The Certificate shall become effective on the date on which the mortgage loan is consummated, and, unless cancelled by the Insured, shall remain in effect for the period for which a premium shall have been paid. The insurance may be renewed after the original Certificate period, at the Insured's option upon written notice to the Company. The renewal premium shall be paid within forty-five (45) days after the renewal date.

5. Cancellation — The Company may at its option, in addition to its other remedies at law, cancel a Certificate upon failure of the Insured to pay any of the premiums (including renewal premiums) within forty-five (45) days after the date the same becomes due and payable, (which in the case of renewal premiums shall be the renewal date), but the Company shall not otherwise have the right to cancel a Certificate. The Insured may at any time cancel the insurance of a loan for which no claim for loss has been filed by returning the Certificate to the Company, in which case a portion of the premium paid will be refunded in accordance with the cancellation schedule on file with the insurance regulatory authorities. The Company reserves the right to terminate this policy at any time, subject to its remaining liable on the Commitments and Certificates already issued hereunder to the Insured.

6. Completed Construction — If improvements on the real estate are proposed or in the process of construction, the Company shall not pay any claim for loss until such construction is completed according to plans and specifications. Any expenses incurred or sums advanced by the Insured incident to completing such construction which exceed the amount of the Company's insurance shall not be included in any claim for loss.

7. Restoration of Damage — If any physical loss or damage occurs to the real estate from any cause, whether through accidental means or otherwise, the Insured shall cause the real estate to be restored to its condition as at the effective date of the original Certificate period, reasonable wear and tear excepted; and the expenses incurred in such restoration shall not be included in the Insured's claim for loss.

8. Eminent Domain — If the value of the real estate is reduced through the exercise of eminent domain or condemnation (or a sale in lieu of such condemnation), the Insured shall require the borrower to apply the entire proceeds awarded in or resulting from such taking or sale toward payment of the loan.

9. Notice of Default — Within ten (10) days after the borrower is four (4)* months in default, as defined herein, notice thereof shall be given to the Company by the Insured upon the form furnished by the Company, provided, however, that failure of the Company to furnish forms shall not relieve the Insured of the obligation to give notice within the required time in any reason-

EXHIBIT A

Verex Assurance, Inc.
Home Office:
150 E. Gilman Street
Box 7066, Madison, WI 53707
Telephone 1-800-356-8080
1-800-362-8070 (within WI)

Mortgage Pool Insurance Policy
Accumulated Pools

VEREX™

A subsidiary of
The Greyhound Corporation

VEREX ASSURANCE, INC., Madison, Wisconsin
(A Stock Company Hereinafter Called the "Company")

AGREES TO PAY

the Insured identified below, in consideration of the premium paid or to be paid as specified herein, any loss sustained by reason of the default in payments by a borrower on any Mortgage Agreement included in the attached Schedule(s) after underwriting and approval by the Company, subject to the conditions contained herein.

Insured's Name and Mailing Address

Insured's Identification Number | Policy Number | Effective Date

Final Accumulation Date | Final Termination Date

Premium—_____% annual installment rate payable _____ at _____% computed on the unpaid total principal balance.

Initial total principal balances:
Maximum total principal balances:

Accumulation Term:

Special Conditions:

Coverage under this Policy is the following: 100% of the loss on individual loans on one-to-four family residential properties, as defined in the terms and conditions of this Policy. Notwithstanding the full coverage for individual loans, the coverage is limited to the lesser of $_____or_____% of total principal balances of all the Mortgage Agreements to be insured hereunder.

Signature

IN WITNESS WHEREOF, The Company has caused its Corporate Seal to be hereto affixed and these presents to be signed by its duly authorized officers in facsimile to become effective as its original seal and signatures and binding on the Company by virtue of countersignature by its duly authorized agent.

Verex Assurance, Inc.

EXHIBIT B

President

Secretary

By: _____

AUTHORIZED AGENT

Form 2-223 (1/79)

The sum of:

(1) The amount of the unpaid principal balance at the time of an Approved Sale of the property,

(2) the amount of the accumulated delinquent interest computed to the date of claim settlement at the Mortgage Agreement rate of interest, but excluding applicable late charges and penalty interest, and

(3) the amount of advances made by the Insured under Condition A above,

less, the net proceeds upon an Approved Sale of the property.

The amount of the loss payable on any loan where the original loan-to-value ratio exceeded _____ percent (%) shall be reduced by the proceeds from required FHA, VA or private mortgage insurance under a primary policy or guarantee providing acceptable coverage against loss resulting from a Borrower's Default. The primary policy shall, as a minimum, provide coverage on the amount of the Mortgage Agreement in excess of _____ percent (%) of original fair market value and must remain in force until the principal balance of the Insured Mortgage Agreement is reduced to _____ percent (%) of original fair market value. Fair market value is the lesser of either sale price or appraised value.

D. Claim Payment Option—Subject to the aggregate liability contained in Condition 5F, in lieu of paying the loss determined by the computation in Condition 5C above, the Company may, at its option, pay the Insured the sum of the amounts under (1), (2), and (3) of Condition 5C. Upon such payment, the Insured shall provide the Company with Good and Merchantable Title to the property. Within thirty (30) days after the property is sold by the Company, the Company shall give written notice to the Insured of the net amount received from the sale.

E. Discharge of Obligation—Any claim payment by the Company pursuant to Condition 5C or 5D above shall be a full and final discharge of its obligation with respect to such claim under the terms of this Policy.

F. Aggregate Loss Limits—Notwithstanding the provisions of Conditions 5C and 5D above, but subject to any Special conditions on the face hereof, the total aggregate liability of the Company under this Policy shall not exceed an amount equal to _____ percent (%) of the total principal balances of the Mortgage Agreements listed in the Schedule(s) at the Final Accumulation Date of this Policy after giving effect to principal payments due on such date. Total aggregate liability is the sum of losses paid by the Company: (1) pursuant to Condition 5C above and (2) pursuant to Condition 5D above, reduced by any net amount the Company receives upon disposal of the property.

6. When Claims Submitted and Payable

Unless otherwise mutually agreed, a claim for loss may be filed with the Company on the appropriate form provided by the Company within sixty (60) days after the Insured has conveyed title to the property pursuant to an Approved Sale. Failure to file a claim for loss within sixty (60) days shall be deemed an election by the Insured to waive any right to claim payment under the terms of this Policy, provided that such sixty (60) day period shall not commence until the appropriate form has been provided by the Company to the Insured. Any claim payment due the Insured shall be payable within thirty (30) days after a claim is received by the Company.

7. Subrogation

The Company reserves the right to make claim against any borrower or any other party liable for the loss for any loss paid or deficiency suffered by the Company. The Company shall be subrogated to all of the Insured's or mortgagee's rights against the borrower or any other party liable for the loss, including deficiency judgments or rights, which judgments or rights shall be assigned to the Company upon demand. The Company shall be be reimbursed first out of any subrogation recovery, to the full extent of its claim payment or loss, and the Insured shall be entitled to any remaining balance.

8. Where Notice is Given

All notices, claims, tenders, reports and other data required to be submitted to the Company by the Insured shall be mailed postpaid to any agent or to the home office of the Company at 150 East Gilman Street, Post Office Box 7066, Madison, Wisconsin 53707. The Company may change this address by giving written notice to the Insured.

Vorex Assurance, Inc.
150 E. Gilman Street/Box 7066
Madison, WI 53707
Telephone 1-800-356-8080
1-800-362-8070 (within WI)

Short Rate Cancellation Schedule

VOREX

A subsidiary of
The Greyhound Corporation

ANNUAL PREMIUM

Days Policy In Force	Per Cent of Premium Retained
1	5
2	6
3- 4	7
5- 6	8
7- 8	9
9- 10	10
11- 12	11
13- 14	12
15- 16	13
17- 18	14
19- 20	15
21- 22	16
23- 26	17
26- 29	18
30- 32 (1 mo.)	19
33- 36	20
37- 40	21
41- 43	22
44- 47	23
48- 51	24
52- 54	25
55- 58	26
59- 62 (2 mos.)	27
63- 66	28
67- 69	29
70- 73	30
74- 76	31
77- 80	32
81- 83	33
84- 87	34
88- 91 (3 mos.)	35
92- 94	36
95- 98	37
99-102	38
103-106	39
106-109	40
110-113	41
114-116	42
117-120	43
121-124 (4 mos.)	44
125-127	45
128-131	46
132-135	47
136-138	48
139-142	49
143-146	50
147-149	51
150-153 (5 mos.)	52
154-156	53
157-160	54
161-164	55
165-167	56
168-171	57
172-175	58
176-178	59
179-182 (6 mos.)	60
183-187	61
188-191	62
192-196	63
197-200	64
201-205	65
206-209	66
210-214 (7 mos.)	67
215-218	68
219-223	69
224-228	70
229-232	71
233-237	72
238-241	73
242-246 (8 mos.)	74
247-250	75
251-255	76
256-260	77
261-264	78
265-269	79
270-273 (9 mos.)	80
274-278	81
279-282	82
283-287	83
288-291	84
292-296	85
297-301	86
302-306 (10 mos.)	87
306-310	88
311-314	89
315-319	90
320-323	91
324-328	92
329-332	93
333-337 (11 mos.)	94
338-342	95
343-346	96
347-351	97
352-355	98
356-360	99
361-365	100

Minimum Retained Premium
Initial Coverage $30.00 Renewal of Coverage $10.00

SINGLE PREMIUM PLANS

Months Policy In Force / Year	2	3	4	5	6	7	10	12	15
1	10	9	8	7	7	6	5	3	2
2	18	16	13	11	10	9	7	6	4
3	28	23	18	15	13	11	9	8	7
4	35	29	23	19	16	15	11	10	8
5	40	34	28	23	19	17	13	11	10
6	47	40	33	27	23	20	15	13	11
7	49	43	37	31	26	23	17	15	12
8	54	47	40	35	28	25	19	16	14
9	58	50	42	38	31	29	21	18	15
10	61	53	45	40	34	31	23	20	16
11	66	57	47	42	36	33	25	22	18
12 (1 yr.)	70	60	50	44	38	37	27	23	19
13	73	63	52	46	40	39	29	25	20
14	76	67	55	48	42	40	31	27	22
15	79	70	57	50	44	41	33	28	23
16	82	73	60	52	46	43	35	30	24
17	86	76	62	54	48	44	37	31	26
18	90	78	65	56	50	46	38	33	27
19	95	80	67	58	52	47	39	35	28
20	96	82	70	60	54	49	40	36	30
21	97	84	72	62	56	50	41	37	31
22	98	85	75	64	58	51	42	38	32
23	99	87	78	66	60	53	43	39	34
24 (2 yrs.)	100	89	78	68	62	54	44	40	35
25		90	79	70	64	56	45	40	36
26		92	81	72	66	57	48	42	37
27		93	82	74	68	59	47	43	38
28		94	84	76	69	60	48	43	38
29		96	86	77	70	61	49	44	39
30		96	86	78	71	63	50	45	40
31		96	87	79	72	64	51	46	40

Months Policy In Force / Year	3	4	5	6	7	10	12	15
32	97	88	80	74	66	52	47	41
33	98	90	83	76	67	53	47	42
34	99	91	85	78	69	54	49	43
35	99	93	86	77	70	55	49	43
36 (3 yrs.)	100	93	86	78	71	56	50	44
37		96	88	79	73	57	51	45
38		97	89	80	74	58	52	45
39		98	91	81	76	59	53	46
40		98	92	82	76	60	53	47
41		98	93	83	77	61	54	47
42		98	94	84	78	62	55	48
43		98	94	84	78	63	56	49
44		98	96	86	80	64	57	49
45		98	96	86	80	65	57	50
46		98	97	87	82	66	59	51
47		98	98	88	82	67	59	51
48 (4 yrs.)	100	98	98	88	83	68	60	52
49		98	98	90	84	69	61	53
50		98	98	90	84	70	62	53
51		98	98	91	85	71	63	54
52		98	98	91	86	72	63	55
53		98	98	92	87	73	64	55
54		98	98	92	87	74	65	56
55		98	98	93	88	75	66	57
56		98	98	94	89	76	67	57
57		98	98	94	90	76	67	58
58		98	98	94	90	77	69	59
59		100	98	95	91	77	69	59
60 (5 yrs.)		100	98	95	91	78	70	60
61			98	96	92	78	71	61
62			98	96	92	79	72	61

Months Policy In Force / Year	5	7	10	12	15
63	97	93	80	73	62
64	97	93	90	73	63
65	98	94	81	74	63
66	98	94	82	75	64
67	99	95	82	76	65
68	99	95	83	76	65
69	99	95	83	77	66
70	100	96	84	77	67
71	100	96	84	78	67
72 (6 yrs.)	100	96	85	78	68
73		97	85	78	69
74		97	86	79	69
75		97	86	79	70
76		98	87	80	71
77		98	87	80	71
78		98	88	81	72
79		99	88	82	73
80		99	89	82	73
81		99	89	83	74
82		99	90	83	75
83		100	90	84	75
84-85 (7 yrs.)		100	91	84	76
86			91	85	77
87-88			92	86	77
89			92	86	78
90-91			93	87	78
92			93	87	79
93-94			94	88	79
95			94	88	80
96 (8 yrs.)			95	89	80
97			95	89	81

Months Policy In Force / Year	10	12	15
98	95	90	81
99	95	90	82
100	96	91	82
101-102	96	91	83
103-104	97	91	84
105-106	97	92	84
107	97	93	85
108-109 (9 yrs.)	98	93	86
110-111	98	93	86
112	98	94	86
113	99	94	87
114-115	99	95	87
116-117	99	95	88
118	100	95	88
119-121 (10 yrs)	100	96	89
122-123		96	90
124		97	90
125-128		97	91
129-130		98	91
131-133 (11 yrs.)		98	92
134-135		98	93
136-138		99	93
140		99	94
141-142		100	94
143-144 (12 yrs.)		100	95
145-148 (12 yrs.)			95
149-154			96
155-160 (13 yrs.)			97
161-169 (14 yrs.)			98
170-175			99
176-180 (15 yrs.)			100

Minimum Retained Premium
Initial Coverage $60.00 Renewal of Coverage $10.00

Form FJEB (3/83)

EXHIBIT C

respect to plaintiff's allegations regarding defendant's bad faith conduct. The Court finds genuine factual disputes with respect to these allegations. However, these disputes are not material in light of the resolution of defendant's motion for summary judgment on the narrow grounds set forth in this opinion.

VI. PLAINTIFF'S ATTORNEY FEE CLAIM

MCC's counsel has sought attorney fees for services performed which were incurred prior to and in connection with the settlement of the underlying claims. These services are unrelated to the punitive damages claim. See Order of June 2, 1989.

In the absence of a judgment rendered in favor of plaintiff on its bad faith claim, the only arguable statutory authority for the award of attorney fees is 36 Okla. Stat. § 3629(B) (1985).[6] This section provides in pertinent part:

> It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party. For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party. If the insured is the prevailing party, the court in rendering judgment shall add interest on the verdict at the rate of fifteen percent (15%) per year from the date the loss was

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[6]In the Tenth Circuit, attorney fees may only be awarded pursuant to statute or contract. See An Son Corp. v. Holland America Ins. Co., 767 F.2d 700, 703 (10th Cir. 1985). In this case, plaintiff has not urged any contractual basis for the award of attorney fees.

Moreover, at the hearing held on June 5, 1989, plaintiff's counsel acknowledged that § 3629(B) was the only statute under which plaintiff was seeking to recover attorney fees.

payable pursuant to the provisions of the contract to the date of the verdict.

Id. (emphasis added).

Only a strained reading of this statute could result in an award of attorney fees to plaintiff. In this case, the intervening plaintiffs, as insureds, have disclaimed any interest in attorney's fees. Moreover, no judgment has nor will be entered against defendant Verex on the insurance contract claims since those claims have been settled by mutual agreement between Verex and the intervening plaintiffs.

Plaintiffs argue, however, that the December 5, 1988 Partial Agreed Judgment obligates the defendant to pay "some" of the amounts sought by plaintiff.[7] Even a cursory review of this judgment however, reveals that it does not represent a judgment for any sums of money with respect to the claims in this lawsuit. While it provides a vehicle for the construction and interpretation of policy terms to facilitate the settlement of such claims, it is clearly not a judgment in favor of a prevailing party as envisioned by Section 3629(B).

Even if the Court was inclined to interpret Section 3629(B) as permitting plaintiff to recover attorney fees under the facts of this case, which it is not, the evidentiary hearing held on June 5, 1989 persuades the Court that it has no reliable basis for making such an award in this case. This is because the June 5, 1989 record in this case unquestionably establishes that

[7]A certified copy of this judgment is attached hereto as Exhibit B.

plaintiff's counsel failed to keep "meticulous, contemporaneous time records" as required by this Circuit. Ramos v. Lamm, 713 F.2d 546, 553 (10th Cir. 1983).

The June 5, 1989 testimony of plaintiff's counsel Jack Gaither and Bruce Gaither fails to provide any basis for a finding of adequate time records. Indeed, from the evidence submitted by plaintiff, it was impossible for the Court or opposing counsel to make an intelligent inquiry into the nature of services performed in light of the haphazard manner in which the records were kept. It was also apparent to the Court that many of the entries were erroneous.[8] Although the Court would radically reduce any attorney fee award as a result of these inadequacies, Hensley v. Eckerhart, 461 U.S. 424 (1983), the precise calculations of such a reduction need not be explored further given the absence of a statutory basis for an attorney fee award in this case.

VII. CONCLUSION

Accordingly, the Court **GRANTS** Verex' motion for summary judgment on plaintiff's bad faith punitive damages claim, and **DENIES** plaintiff's request for attorney fees. Within seven (7) days of this Order, defendant's counsel is to prepare a judgment in accordance with this Order, have it approved as to form only by plaintiff's counsel, and file it with the Clerk of the Northern

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[8]Among other things, plaintiff's documentation failed to include acknowledged conferences and meetings with defense counsel and failed to provide any detail with respect to alleged legal research undertaken by plaintiff's counsel. There were also numerous instances in which paralegal duties were billed at attorney hourly rates.

District of Oklahoma for signature by the undersigned.

IT IS SO ORDERED THIS 2nd DAY OF AUGUST, 1989.

LAYN R. PHILLIPS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

MORTGAGE CLEARING CORPORATION, a corporation,

Plaintiff,

v.

VEREX ASSURANCE, INC.,

Defendant,

and

OKLAHOMA HOUSING FINANCE AGENCY, and BANK OF OKLAHOMA, N.A., TRUSTEE; BANK OF OKLAHOMA, N.A., TRUSTEE FOR BONDHOLDERS FOR CLEVELAND COUNTY HOME FINANCE AUTHORITY and MUSKOGEE COUNTY HOME LOAN AUTHORITY,

Intervening Plaintiffs.

No. 87-C-777-B

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON MAY 9, 1989

CONFERENCE

BEFORE THE HONORABLE THOMAS R. BRETT, Judge.

Beebe Caslavka
UNITED STATES COURT REPORTER

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

MORTGAGE CLEARING CORPORATION, a corporation,

Plaintiff,

v.

VEREX ASSURANCE, INC.,

Defendant,

and

OKLAHOMA HOUSING FINANCE AGENCY, and BANK OF OKLAHOMA, N.A., TRUSTEE; BANK OF OKLAHOMA, N.A., TRUSTEE FOR BONDHOLDERS FOR CLEVELAND COUNTY HOME FINANCE AUTHORITY and MUSKOGEE COUNTY HOME LOAN AUTHORITY,

Intervening Plaintiffs.

No. 87-C-777-B

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON MAY 9, 1989

CONFERENCE

BEFORE THE HONORABLE THOMAS R. BRETT, Judge.

Beebe Caslavka
UNITED STATES COURT REPORTER

EXHIBIT A

APPEARANCES:

For the Plaintiff: MR. JACK GAITHER
Law Building
500 West Seventh Street
Tulsa, Oklahoma 74119

For the Defendant: MR. JAMES P. McCANN
Doerner, Stuart, Saunders,
Daniel & Anderson
1000 Atlas Life Building
Tulsa, Oklahoma 74103

For Intervening Plaintiff Bank of Oklahoma: MR. COLLIER H. PATE
Pate & Payne
P. O. Box 1907
Oklahoma City, Oklahoma 73101-1907

For Intervening Plaintiff Oklahoma Housing: MR. JACK R. LAWRENCE
Lawrence, Ellis & Harmon
602 Union Plaza
Oklahoma City, Oklahoma 73112

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PROCEEDINGS

May 9, 1989

THE COURT: This is in our 87-C-777, Mortgage Clearing versus Verex Assurance.

As I understand it, we're having a special conference this morning to see if this matter is going to be ultimately worked out. If not, at least move forward with our final trial setting here on whatever issues remain.

Let's see, for Mortgage Clearing we have whom?

MR. GAITHER: Jack Gaither and Jimmy K. Jones.

THE COURT: All right. And for Verex we have --

MR. McCANN: James McCann.

THE COURT: And who else do we have here?

MR. PATE: Your Honor, I'm Collier Pate. I represent Bank of Oklahoma as Trustee for two of the public programs, Cleveland County Home Finance Authority and Muskogee County Home Loan Authority.

MR. LAWRENCE: Your Honor, Jack Lawrence for Oklahoma Housing Finance Agency.

THE COURT: What issues remain that have not been settled? We've got some attorney's fee questions -- is that what's kind of dangling here -- and what else?

MR. GAITHER: Some claims in toto have to be decided and some items of various claims must be decided. Is that correct?

MR. McCANN: I don't believe that's correct, Your Honor. Verex is of the opinion that as a result of two settlement conferences which have already been held and as a result of continuing settlement discussions and negotiations following those settlement conferences that all matters, we believe, are settled in this case.

However, last Thursday for the first time Mr. Gaither interjected after, as I understand it, approval by his client of the settlement as well as approval by the intervening plaintiffs in this case of a settlement proposal which had been made by Verex, Mr. Gaither interjected for the first time in discussions the question of his attorney fees and the

punitive damage claim which has been presented by Mortgage Clearing Corporation in this case.

We believe the question of attorney's fees at least and certainly the punitive damage claims -- well, I will break those up. The attorney fees we believe were more than adequately addressed during the course of the settlement discussions that took place before Magistrate Wolfe last month in the second round of settlement discussions, if you will.

We had worked out as a result of the first settlement conference a construction of certain policy issues which we believed then would assist the parties in resolving approximately 140 of the individual claims, and that process is ongoing and is about to be, as I understand it, consummated. There were then left approximately 15 additional claims. Specific recommendations and specific negotiations took place with respect to each and every one of those claims, which were addressed individually and, as I understand it, were all accepted by the parties, and then in fact in response to my question or my suggestion that I was going to begin drafting the actual settlement documents and circulate them for everyone's approval there was interjected this question of attorney fees and punitive damages, which we believe were -- at least the attorney fees were specifically addressed in the settlement conference, which is one of the things the parties give up when they settle a case, that they go on down the

road and none of them have to endure additional litigation expenses. Punitive damages were never discussed during the course of settlement.

We have been operating at least the past six to eight weeks upon the assumption that based on negotiations that were ongoing at that time that this case was going to be settled and we believed as late as last week that it was settled. And so with respect to this attorneys fee and punitive damage issue --

THE COURT: Let's see. It always troubles me when people do as poor a job of communicating in a settlement conference as apparently has occurred here. You're suggesting, Mr. McCann, that now it boils down to Mortgage Clearing asserting an attorneys fee and punitive damage claim that you think it was implicit in the settlement negotiations was not a part of the overall settlement at all. As I understand, Mr. Gaither just made the statement a moment ago that there are a lot of individual claims that haven't even been worked out, so it doesn't sound like to me there is too much communication going on.

MR. McCANN: I believe Mr. Gaither's belief that the individual claims have not been worked out is predicated on the assumption that if his attorneys fees and punitive damage claims are not satisfied then he is not prepared to enter into the settlement that was negotiated between the parties.

THE COURT: Was some sort of overall settlement reached as to all "individual claims"?

MR. GAITHER: I'll tell you the situation as I believe it, Your Honor. I have always asserted our claim for attorney fees and exemplary damages every time I had a chance to mention it. Magistrate Wolfe specifically excluded that from any consideration. I got the impression from him that he didn't consider it a matter about which a settlement conference could be effective. He will verify that, I'm sure. We all thought these individual claims --

THE COURT: Wait just a second now. Mr. McCann, did you understand that? Did you understand that Magistrate Wolfe said, now look, we're going to talk about this on a basis of the settlement of individual claims, we're not going to talk about punitive damages or attorneys fees?

MR. McCANN: I did not understand that, Your Honor.

MR. GAITHER: He will verify it -- he told me that.

THE COURT: The question is what did he mean by that? Did he mean the settlement we're going to reach here will not take those into consideration because they shouldn't be part of an agreed settlement and whatever we agree to here is going to be a settlement of the case, or was he saying by that we're all going to agree here to cut the dog's tail off a little bit at a time, we'll cut off the individual claims part --

MR. GAITHER: That's my understanding of it.

THE COURT: -- and then everything else will be reserved for trial on punitive damages and attorneys fees unless you folks work it out.

MR. GAITHER: I'll give you a direct quote. He said, "There is not much I can do about attorneys fees and punitive damages." That's what he said. So I assumed he was excluding it from consideration. It was never mentioned at any of these conferences except when we started out when I made a statement of what our claims were. And we all had labored under the thought that these individual claims and the individual items of many of the claims had been worked out, and Mr. McCann told me that if I didn't --

THE COURT: I don't understand. Where are we if I conclude that you did not reach a settlement on punitive damages and you did not reach a settlement on attorneys fees and whether or not Mortgage Clearing is entitled to any of that remains to be seen hopefully over the next 30 days in a formal trial on those questions? Where are we if that is the case? Have you settled the individual claims or have you not settled the individual claims?

MR. GAITHER: Mr. McCann told me last Wednesday that if we didn't settle this, they weren't going to settle anything. That's the first I'd heard of that change, that if we didn't settle the whole thing we weren't going to settle any of the claims.

MR. McCANN: I told Mr. Gaither that any settlement certainly from my client's perspective and my client's viewpoint in this case was designed to be a settlement of the entire case. My client had no further interest --

THE COURT: If we try whatever you folks can't agree to, assuming something remains for trial including the individual claims, how long will it take to try the case? I'm talking with reasonable stipulations and all.

MR. GAITHER: Three days, we think. Now, that wouldn't include -- Your Honor, if the Court would refer to the status conference order of January 4th, the trial was bifurcated and the issues of attorney fees and punitive damages were reserved for later decision and the Court was going to decide whether or not we had enough that you would let it go to a jury on the punitive damages at that time, and we considered it a nonjury matter for the individual claims.

THE COURT: I see.

MR. GAITHER: That's what this order said.

THE COURT: Mr. Pate, were you and Mr. Lawrence in on this settlement conference business?

MR. PATE: Yes, we were, and may I address the Court, please?

THE COURT: What was your understanding of the tack taken by Magistrate Wolfe? I guess I can call him and find out myself, which I intend to do, to find out where the ball

is.

MR. PATE: Your Honor, my understanding -- we were in the settlement conferences, they were lengthy, we had two, I think probably both of them lasted over, close to ten hours each.

The first one we were able to reach what eventually led to a partial journal entry in this case which resolved I think all of the issues involving costs and so forth. We then came back and had another session and we reduced our dispute down to approximately 20 claims at that point. We had representatives -- Mr. Lawrence had the chairman of the Oklahoma Housing Finance Agency and we had representatives of Cleveland County present, and to my knowledge we were -- the issue of attorney fees and punitive was never addressed. But I was under the assumption that if we resolve all of the issues involving the claims, that that was moot, because to me a settlement is a settlement and that's what we were striving for, and it was never brought -- and we took the lead in the negotiations of the settlement along with Mr. Jones who was providing some of the information which we didn't have immediate access to. But on behalf of the trustee I was negotiating to solve the whole case, and quite frankly the issue of -- as I recall, the issue of punitive and attorney fees never came up. But again I assumed when we settled, the case was settled for all purposes and that was my

understanding with Mr. McCann because when we left that settlement conference --

THE COURT: It's too bad that wasn't made clear because anybody who has practiced law over about a year knows that nobody likes to settle a case a little bit at a time. Now that, Mr. Gaither -- Mr. Jones knows that. It's too bad you all didn't communicate a little better on that subject because corporations that have any sense don't do that or at least they have a durn good understanding that we're not doing that or that we are doing that, see? So obviously there was a little laying behind the log here that has brought us to where we are.

MR. GAITHER: Well, Your Honor, if I may speak, there was not -- the magistrate specifically said he wasn't going to deal with that, and there was nothing I could do about it. That's why it was never discussed. I mentioned it when we started.

THE COURT: The fact that he said we're not going to deal with it does not necessarily mean that you will settle this lawsuit a little bit at a time. That doesn't necessarily mean that at all. It necessarily means, or it might reasonably mean that we're simply going to have a settlement of this and we'll work it out, that will end it once and for all. And so you all obviously did a poor job of communicating on that subject and it's too bad because all you needed to say, very

simply, was Judge, we're serious about our punitive damages, we're serious about our attorney fees and if we can't have a settlement of that cause paying us either punitive damages and/or attorney fees we ain't going to have a settlement. You know, that's just a matter of communicating, that's just a matter of communicating.

MR. GAITHER: That was communicated to the magistrate early and in the middle but I don't know, there wasn't toward the end --

THE COURT: I need to talk to him about it. I don't think it's going to help one way or another what I learn from him. But these two gentlemen -- maybe I should say three -- who were all capable, long-time trial advocates who thought you were working out a settlement of the whole ball of wax --

MR. GAITHER: Well, I don't think they thought that, Your Honor.

THE COURT: I don't think they'd come in here and tell the Court that if they didn't sincerely believe that. And obviously there was just some miscommunication going on here. But regrettably -- you know, if you ever spend much time representing corporations, seldom, in a small, minute percentage of cases does any corporation like to settle a lawsuit a little bit at a time.

MR. GAITHER: Well, I don't know that the case has been settled. But what would justify even our comrades on the

plaintiff's side from thinking that I'm working for nothing? They refuse to pay my attorney fees yet all the money that we're collecting goes to them, so they have no reason to think we would ever waive that or it had been settled.

THE COURT: I'm not talking about the merits of that at all. I'm talking about the merits of your communication on the subject because, you know -- I have no idea what the magistrate is going to say on the subject, but you want to make a -- of course, it's not too judicious to say this but if you'd like to make a little hundred dollar side bet I'll bet you he'll say I thought we were settling the whole thing and it was not his intent to leave the punitive damages and the attorneys fee dangling. You-all didn't communicate on the subject. I'm not going to solve that here. If you weren't communicating on the subject, that's that and there's nothing I can do about that. I think the thing to do is to see if you-all can work it out because you didn't communicate, apparently.

I'm simply interested in getting the case tried and I think the way to handle that is, Judge Phillips has advised me -- I'm going to be out of the office starting the 5th of June for a week. Judge Phillips has advised me he'll be here, he'll be here ready to try this lawsuit. I simply want to set this lawsuit for trial.

It seems to me on the issue of both punitive damages

and attorneys fees, I take it if you're interested in having a jury trial on the punitive damage aspect of the matter, if it's a matter that justifies punitive damages, he can try that aspect and determine if there is an issue of fact on the punitive damages. I don't see any reason at all he can't try the attorney fee question. Is there?

MR. GAITHER: No, I don't think so. That would be a nonjury matter, I think.

THE COURT: It would seem to me, if you-all haven't and can't work it out, and from what I've heard here on this business of punitive damages and attorney fee thing it sounds like to me you-all spent about ten hours ironing with a cold iron, just wasting your time, and on a matter that simple it just seems to me rather elementary that lawyers could do a heck of a lot better job of communicating. And all you needed to say, Mr. Gaither, was I just want it all understood at the outset of this we're not settling punitive damages and we're not settling attorneys fees in all of this other stuff; that in other words once we get all this other stuff settled we're going to spend time arguing our entitlement to thousands and thousands of dollars worth of attorneys fees -- how much?

MR. GAITHER: It will be thousands, yes, sir.

THE COURT: How much, approximately?

MR. GAITHER: 150,000 or something like that, I guess. I don't know. I haven't totaled it up.

THE COURT: How much punitive damages?

MR. GAITHER: $100 million. And we're serious about that. We feel that the punitive element of this case is worth more than the rest of it put together.

THE COURT: And for you gentlemen to sit down here and spend ten hours of that settlement judge's time with a $100 million, $150,000 dangling claim that is not being worked out is an absolute and total absurdity.

MR. GAITHER: He didn't --

THE COURT: I'm not going to settle that at this time. But for you to say that these gentlemen here were settling everything and leave a $100 million claim dangling, Mr. Gaither, that's two things, it's an absurdity and it's ridiciulous. But we're not going to settle that now. But, you know, that's silly for you-all to spend ten hours hammering through these little old nit-picking claims, which obviously aren't nit-picking to the parties, to have a hundred million dollar claim just laying out here dangling. Now, no, no party is going to settle on that kind of a basis, so for you-all to think that was going on down there just doesn't make any sense.

MR. GAITHER: Your Honor's order of January 4th said the parties represent to the Court that detailed negotiations are ongoing to compromise and shorten the claims and issues. It didn't say anything about punitive damages or attorney

fees. That was the understanding from the beginning and that's the only thing that was ever discussed.

MR. PATE: Your Honor, may I address --

THE COURT: But I'll tell you what, you would have saved ten hours if you had just announced at the very beginning, we've got a hundred million dollar punitive damage claim, we're serious about it, we're entitled to every single penny and, Judge, unless you can get us that hundred million we're wasting our time here. We just want you to understand that. That's all you needed to say, see?

MR. GAITHER: Well, we accomplished a lot, Your Honor. We had an agreed judgment that settled some of these issues and it would have shortened the trial, but it was never considered a part of this settlement discussion, the judge didn't want to consider it.

THE COURT: But it's regrettable that good lawyers would sit down there and go through somewhat of a charade with some of them thinking that punitive damages was outstanding for a hundred million and others thinking that it wasn't. But I don't know anything to do other than set it for the 5th. Judge Phillips will be over here. He'll try it for you.

What else have we got to talk about?

MR. PATE: Your Honor, if I may, I would like to address the Court -- I didn't know we'd have a reporter present. I would like to make a record on a couple of points,

if I may, in regard to where we have been placed.

I want the record to be clear that in relation to the intervening plaintiff, which is the trustee Bank of Oklahoma on behalf of the two public programs, that we are in total agreement to settle with Verex as we have worked out our claims. We gave -- we are giving up some, Verex is giving up some and we're in total agreement on that, and I want it to be clear for the record that it is the servicer, Mortgage Clearing Corporation, that is standing in our way of us receiving the funds. And it would be the position of the trustee that in the event this case is eventually tried and the trustee receives less money than what has been offered by Verex that we will be looking to Mortgage Clearing Corporation for that difference. That is the position of the trustee.

Your Honor, I don't know if there is a middle ground at this point. I might make a suggestion that if it could be reconsidered by Mortgage Clearing Corporation as to whether or not they want to pursue the punitive and attorney fees, I guess the question comes to my mind if punitive damages are even legally permissible under the facts of this situation and if it was tried and punitive damages were awarded, I don't know where the money would go. If it would go to the trustee, the trustee is willing to waive that. We do not, and when we intervened did not make any claim for punitive nor do we make a claim for attorney fees, so we're not pursuing that. And I

want the record clear on that, that it is the servicer that is standing between us and a settlement at this point.

THE COURT: When is your pretrial order due in this case?

MR. PATE: Your Honor, I think we kind of scrambled to get one together today but I don't know that it's totally in agreement at this point.

THE COURT: Have you placed all of this announcement you're talking about in that pretrial order?

MR. PATE: No, Your Honor, again, because we've had a very short time. When we learned that it was not --

THE COURT: I'll give you some more time to work that out, but I think it's important for you to include every bit of that in a pretrial order so your position is made known there.

MR. PAGE: Yes, sir. And I believe we had to take the position as a trustee that we don't have the legal ability either contractually or otherwise to dictate to the servicer. We have a contract with Mortgage Clearing Corporation and the trustee and I have reviewed it, had other attorneys review it in our office, and we have concluded we don't have the ability to dictate to the servicer, but I believe it's implicit within the contract that there is certainly a fiduciary obligation from the servicer back to the trustee and I think that the servicer should be taking into consideration the wishes and

the wants of the trustee because eventually the monies come back to us in this case and I want the record to be clear on our position in this matter.

MR. GAITHER: Your Honor, may I correct one part of his statement? They did sue for attorney fees, and they did assert it but it was never -- theirs weren't discussed in this settlement conference either. Is that correct?

MR. PATE: Your Honor, as I recollect, we certainly did not sue for punitive, and as for attorney fees we withdraw that at this point.

MR. GAITHER: At this point but never before.

THE COURT: As I understand what you're saying is as far as your settlement discussions are concerned on behalf of your client you assumed that the overall settlement would include attorneys fees if any.

MR. PATE: Yes, sir. But again --

THE COURT: To you.

MR. PATE: Yes, sir.

THE COURT: That was your settlement posture and understanding.

MR. PATE: Yes, sir, because to me when we sat down and as many hours as we put in in settling this case and to think that we were not including all the issues in settlement is not acceptable to me. I believe that it was.

THE COURT: Of course, we hold these settlement

conferences around here, Mr. Gaither, by the dozens and a lot of times there's a little dangling punitive damage claim there that's used for purposes of strategy and getting the other side's attention, and more often than not when the case is concluded by settlement through a settlement conference the punitive damage claim goes with it. Normally that's not left dangling. And the problem that I have with your-all's discussions, you know, to have a hundred million dollar serious, serious, punitive damage claim that's not going to be considered in the settlement negotiations and all and everybody agrees to leave that dangling, you just should have done a little better job of communicating on the subject.

MR. GAITHER: I'm ready to communicate but the magistrate didn't want to talk about it, Judge, so that's why it has never been discussed. I'm ready to negotiate on the rest of this case now but nobody has ever offered to negotiate with me.

THE COURT: Again -- although I'm not communicating very well and obviously because you don't either agree or understand what I'm talking about -- it should have been made very clear at the outset of the conference we've got a hundred million dollar claim here, Judge, we're never giving up on, period. Now, with that understanding let's talk. And you know what he would have said and what he would have said? Judge, we're wasting our time, let's go over and try the

lawsuit.

And next time you come to a settlement conference over here, if there's any part of it that's not going to be considered as part of it just make it clear at the outset. You could do it in two minutes or less. And you obviously didn't make that clear. That's my only comment to you. And you say, well, the judge said he wasn't going to consider it. I don't care what he said on that subject. If you've got a hundred million dollar claim you're not giving up on under any circumstances, just make that clear at the outset or a one million or a 500,000 or a $10,000 one. Obviously that has something to do with the understanding of the lawyers that are engaging in a good faith settlement, see?

MR. GAITHER: Your Honor, it should be clear without being mentioned that I expect somebody to pay my attorney fees. They refuse to pay, he refuses to pay, we've collected millions of dollars to benefit these intervenors and I want to be paid. And they knew that, everybody knew that.

THE COURT: Of course, one reason, Mr. Gaither, that it's not all that clear on attorneys fees all the time, here's somebody that prayed for attorney fees right there, isn't there? Didn't he pray for attorney fees?

MR. GAITHER: And he gets all the money, we get nothing.

THE COURT: Didn't he say that I'm giving up my

attorneys fee? So in these settlement negotiations persons give up attorneys fees all the time. Frequently, more often than not, that's the case. So all I say to you is, Judge, we just want it understood at the beginning we've got about a $150,000 attorney fee claim, I don't care what we agree to on all the rest of this stuff we're urging our $150,000 attorney fee. We want that understanding. Just make that clear. That's all you've got to do is make it clear, which obviously wasn't done here. And I can tell by your yawn you're extremely impressed with this discussion.

MR. GAITHER: That wasn't a yawn, Your Honor, but --

THE COURT: We've got more cases over here than we can say grace over. We've got judges who sit around and hold people's hands in these settlement conferences and it's a marvelous procedure but it's extremely important that everybody communicate, and this case shows that there was a very, very poor job of communicating. And I don't know whose fault it was, I don't know whose fault it was, but anybody who is saying we've got a huge claim that we're not -- there is no negotiation being considered here on and until it is we'll never settle this lawsuit, Judge, just make that clear at the outset. That's all I ask you.

MR. GAITHER: The settlement conference accomplished something. We settled some of the issues and some of the items. But the magistrate told us --

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BULLARD, JAMES H. and
COYWILLOW F. BULLARD

Plaintiff(s),

vs.

No. 86-C-732-B

COLLINS INDUSTRIES, INC., a
New Jersey Corporation, a/k/a
COLLINS COMPANY, LTD.,

Defendant(s).

FILED

AUG - 1 1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

**JUDGMENT DISMISSING ACTION
BY REASON OF SETTLEMENT**

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 2nd day of Aug, 1989.

United States District Judge

C-11:10/88

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MIDAMERICA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

Case No. 88-C-1344-B

SHERIDAN PROPERTIES, INC., a Tennessee corporation; ROBERT J. PHILLIPS; WANDA N. PHILLIPS: JUSTIN LYON; VIRGYL D. JOHNSON; RAYMOND M. BRIGGS ERWIN LEE KING; JAMES O.SHOEMAKER; THOMAS C. HARMON; HELEN P. BRIGGS; EILEEN L. KING; MELANIE SHOEMAKER; DARVEN L. BROWN; FINIS W. SMITH; DAVID W. GRAHAM; JOAN GRAHAM; METROLPOLITAN FEDERAL BANK, FSB, formerly doing business as Metropolitan Federal Savings and Loan Association; and TURNER CORPORATION OF OKLAHOMA, INC.,

Defendants,

and

GREEN COUNTRY APPRAISAL SERVICE, INC., an Oklahoma corporation,

Third-Party Defendant.

ORDER OF DISMISSAL

This matter comes on before me, the undersigned Judge of the United States District Court for the Northern District of Oklahoma on this 3rd day of August, 1989, pursuant to the Application of the Defendants, Robert J. Phillips and Wanda N. Phillips to dismiss their counterclaim against Plaintiffs with

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CLIFFORD WEAVER and ARMEDA WEAVER, husband and wife,	)	
Plaintiffs,	)	
vs.	)	No. 89-C-183-B
STATE FARM AND CASUALTY COMPANY, a corporation, and MIKE AUSTIN, an individual,	)	
Defendants.	)	

O R D E R

This matter comes before the Court on Plaintiffs' Motion to Remand for lack of diversity jurisdiction and Defendant Mike Austin's Motion to Dismiss for lack of subject matter jurisdiction as to him. For the reasons stated herein, the Motion to Dismiss is GRANTED and the Motion to Remand is DENIED.

Plaintiffs filed suit in State court based on a contract of insurance and for the alleged bad faith actions of Defendant State Farm Fire & Casualty Company ("State Farm"). State Farm timely removed the case to this court.

A scheduling conference was held May 8, 1989, which resulted in an order, entered that date and filed May 18, 1989, providing, *inter alia,* "Motions to add parties or amend pleadings must be done by June 9, 1989."

Plaintiffs, on May 23, 1989, filed their Amendment to Complaint wherein they added, as a party Defendant, Mike Austin,

presumedly an agent of State Farm.[1] Defendant State Farm filed an answer to the Amendment to Complaint raising no objection to the filing of such.

If Austin was an agent of State Farm at the critical times herein, the next question is, does the Amendment to Complaint state a cause of action against him individually, sufficiently to withstand the rigors of indispensability or permissible joinder. The Court concludes the answer is no.

Under Oklahoma law, an employee is not liable to third persons for his nonperformance of a duty of his employment, but only for acts of positive wrong and negligence. Scott v. Huffman, 237 F.2d 396 (10th Cir. 1956); Killebrew v. Atchison, Topeka & Santa Fe Ry. Co., 233 F.Supp. 250 (W.D.Okla. 1964). To establish liability on the part of an employee, "It is necessary for the plaintiff to have alleged a failure on the part of the defendant to perform a duty which he owed to the plaintiff, notwithstanding defendant's employment." Killebrew v. Atchison, Topeka & Santa Fe, supra.

Additionally, it is not enough to merely plead a cause if in fact no cause of action exists. Lobato v. Pay Less Drug Stores, Inc., 261 F.2d 406 (10th Cir. 1958); Dodd v. Fawcett Publications,

[1]The Amendment to Complaint fails to allege the relationship of Austin to State Farm or why Austin would owe a fiduciary relationship to Plaintiffs. The briefs filed by the parties indicate Austin is or was an agent of State Farm during the time frame giving rise to this action.

Inc., 329 F.2d 82 (10th Cir. 1964).[2]

Plaintiffs' Amendment to Complaint does not sufficiently state the relationship between Austin and the Plaintiffs and also fails to establish the Austin-State Farm nexus. The Amendment, as stated, fails to plead a proper cause of action against Austin and should be, accordingly, dismissed without prejudice. Amendment of pleadings to bring in a new party amounts to a new and independent cause of action. Fed.R.Civ.P. 15(a, c), 28 U.S.C.; Martz v. Miller Brothers Company, 244 F.Supp. 246 (D.C.Del. 1965); *see also,* Rules 7 and 8, Fed.R.Civ.P.

The Plaintiffs' Motion to Remand is DENIED.

The Defendant Mike Austin's Motion to Dismiss is GRANTED.

A Scheduling Order has previously been entered which still prevails.

IT IS SO ORDERED, this 2nd day of August, 1989.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[2]"This does not mean that the federal court will pre-try, as a matter of course, doubtful issues of fact to determine removability;" Dodd v. Fawcett Publications, Inc., supra.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS ELMER BROADDRICK,

Petitioner,

vs.

STANLEY GLANZ,
Sheriff of Tulsa County,

and

RAYMOND C. VAN PUTTEN,
United States Marshal for the
Northern District of Oklahoma,

Respondents.

No. 89-C-305-C

ORDER

Now before the Court for its consideration are the objections of the petitioner to the Amended Report and Recommendation of the United States Magistrate filed on April 27, 1989. The government has not seen fit to respond.

The petitioner seeks credit toward his federal sentence, which he was prevented from beginning by two now-vacated state sentences.

The Magistrate's Report essentially adopted the reasoning of Pinaud v. James, 851 F.2d 27 (2nd Cir. 1988), which held that a prisoner was generally not entitled to such credit as to a federal sentence when the other sentence was a state sentence. While the statute discussed in Pinaud, 18 U.S.C. §3568 is now repealed, it is applicable to the present petitioner's sentence. In this Court's view, petitioner has failed to sufficiently distinguish

Pinaud. Likewise, petitioner has failed to demonstrate the "extremely limited circumstances" by which habeas corpus relief is available in seeking review of a Parole Commission decision. See Luther v. Molina, 627 F.2d 71, 75-76 (7th Cir. 1980).

Petitioner has also requested release on bond pendente lite and filed a motion for "preliminary injunction" (forcing the government to release petitioner). In view of the Court's reasoning, these are also denied.

It is the Order of the Court that the Amended Report and Recommendation of the United States Magistrate is hereby AFFIRMED. The petition for writ of habeas corpus is hereby DENIED.

It is the further Order of the Court that the motion of petitioner for preliminary injunction and request for release on bond are hereby DENIED.

IT IS SO ORDERED this 1 day of Aug., 1989.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM THEODORE EDWARDS, JR., et al.,

Defendants.

No. 85-C-770-C

ORDER

Now before the Court is the motion of William Theodore Edwards, pro se, to vacate deficiency judgment. This is an action in foreclosure brought by the United States of America. On May 1, 1987, the United States Magistrate entered his Report and Recommendation that a deficiency judgment be entered in the amount of $37,053.15. On that same day, the Court erroneously entered a deficiency judgment (i.e., adopting the Magistrate's Report without permitting objections to be filed.) On May 6, 1987, the Court vacated the deficiency judgment and granted the parties until May 15, 1987 to file any objections to the Magistrate's Report. No objections were filed. On May 27, 1987, the Court again entered deficiency judgment.

On June 16, 1989, over two years after entry of judgment, defendant William Theodore Edwards has filed a motion to vacate the

37

deficiency judgment. In said motions, he states that the judgment was initially vacated on May 1 [sic], 1987 and states that he believed any objections to the Magistrate's Report were unnecessary in view of the judgment's vacation. Defendant does not state that he failed to receive a copy of the judgment entered on May 27, 1987.

Courts are to make reasonable allowances for pro se litigants and to read pro se papers liberally. McCabe v. Arave, 827 F.2d 634, 640 n.6 (9th Cir. 1987). However, a pro se litigant is subject to relevant law and rules of court, including the Federal Rules of Civil Procedure. Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1989).

Defendant's motion necessarily is made under Rule 60 F.R.Cv.P. Relief from a final judgment may be had for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial ...; (3) fraud[,] ... misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied ... or (6) any other reason justifying relief from the operation of the judgment.

The court may treat a motion to vacate a prior judgment as having been made under Rule 60(b)(6) only if the other, more specific grounds for relief encompassed by the rule are inapplicable. Maduakolam v. Columbia Univ, 866 F.2d 53, 55 (2nd Cir. 1989) (citing Liljeberg v. Health Serv. Acquisition Corp., 108 S.Ct. 2194, 2204 (1988)). On its face, the present motion can only be construed as seeking relief under Rule 60(b)(1) for "mistake". Rule 60 provides that a motion under 60(b)(1) must be made within

one year after entry of judgment. Accordingly, the Court must conclude that the present motion is untimely.

It is the Order of the Court that the motion of William Theodore Edwards to vacate deficiency judgment is hereby DENIED.

IT IS SO ORDERED this 1st day of August, 1989.

H. DALE COOK
Chief Judge, U. S. District Court

BAM/jh

FILED

AUG -1 1989

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONY P. MOORE, Plaintiff,	)	
v.	)	
SIGNODE CORPORATION, a Delaware corporation, and WELDOTRON CORPORATION, a New Jersey corporation, Defendants,	)	
and	)	
OKLAHOMA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION, Garnishee.	)	No. 82-C-336-E Post-Judgment Garnishment

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff, Tony P. Moore, by his counsel Bruce A. McKenna of Jack B. Sellers Law Assoc., Inc., and the garnishee, Oklahoma Property and Casualty Insurance Guaranty Association, by its counsel Kim Daniel Parrish and James Percival, stipulate that all matters in controversy between Tony P. Moore and the Oklahoma Property and Casualty Insurance Guaranty Association have been resolved, and this garnishment proceeding should be dismissed with prejudice, with each party bearing his/its own costs and attorneys' fees incurred herein.

Dated: August 1, 1989.

Kim Daniel Parrish
James Percival
1219 Classen Drive, Suite 100
Oklahoma City, OK 73103
(405) 235-6415

ATTORNEYS FOR GARNISHEE

Bruce A. McKenna
Jack B. Sellers Law Assoc., Inc.
P.O. Box 730
Sapulpa, OK 74067
(918) 224-9070

ATTORNEY FOR PLAINTIFF

ORDER OF DISMISSAL

On the foregoing stipulation of the parties herein, it is ordered that the above-entitled garnishment proceeding be, and is, dismissed with prejudice and that each party to that proceeding should bear his/its own costs, expenses, and attorneys' fees.

Dated: August 10, 1989.

/s/ JAMES O. ELLISON

Hon. James O. Ellison
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

AUG - 1 1988

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

INDIAN NATIONS PARK, INC., an Oklahoma Corporation,	)	
Plaintiff	)	CIVIL NO. 87-C-914-E
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant	)	

STIPULATION OF DISMISSAL

It is hereby stipulated and agreed that the complaint in the above-entitled case be dismissed with prejudice, the parties to bear their own costs, including any possible attorneys' fees or other expenses of litigation.

MORGAN K. POWELL
707 South Houston, Suite 200
Tulsa, Oklahoma 74127
(918) 747-4600

ATTORNEY FOR PLAINTIFF

Steven Shapiro

STEVEN SHAPIRO
Chief, Civil Trial Section
Southern Region
P. O. Box 14198
Washington, D.C. 20044

ATTORNEY FOR UNITED STATES

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

INDIAN NATIONS PARK, INC., an Oklahoma Corporation,	)	
Plaintiff	)	CIVIL NO. 87-C-914-E
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant	)	

STIPULATION OF DISMISSAL

It is hereby stipulated and agreed that the complaint in the above-entitled case be dismissed with prejudice, the parties to bear their own costs, including any possible attorneys' fees or other expenses of litigation.

MORGAN K. POWELL
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Tulsa, Oklahoma 74127
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ATTORNEY FOR PLAINTIFF

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Chief, Civil Trial Section
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Washington, D.C. 20044

ATTORNEY FOR UNITED STATES

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	1989
	)	
vs.	)	Jack C. Silver, Clerk U.S. DISTRICT COURT
	)	
MICHAEL D. BOHANNON; JACQUELINE BOHANNON; COUNTY TREASURER, Washington County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma,	)	
	)	
Defendants.	)	CIVIL ACTION NO. 89-C-250-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day of July, 1989. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Washington County, Oklahoma; Board of County Commissioners, Washington County, Oklahoma; Michael D. Bohannon; and Jacqueline Bohannon, appear not, but make default.

The Court being fully advised and having examined the file herein finds that the Defendants, Michael D. Bohannon and Jacqueline Bohannon, were served with Summons and Complaint on May 26, 1989; that Defendant, County Treasurer, Washington County, Oklahoma, acknowledged receipt of Summons and Complaint on May 1, 1989; and that Defendant, Board of County Commissioners, Washington County, Oklahoma, acknowledged receipt of Summons and Complaint on May 1, 1989.

It appears that the Defendants, County Treasurer, Washington County, Oklahoma; Board of County Commissioners, Washington County, Oklahoma; Michael D. Bohannon; and Jacqueline Bohannon, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Washington County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Nine (9) in Block Four (4) of Sunset Addition to Bartlesville, Washington County, Oklahoma.

The Court further finds that on December 23, 1985, the Defendants, Michael D. Bohannon and Jacqueline Bohannon, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $22,200.00, payable in monthly installments, with interest thereon at the rate of eleven percent (11%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Michael D. Bohannon and Jacqueline Bohannon, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated December 23, 1985, covering the above-described property. Said mortgage was recorded on December 26, 1985, in Book 837, Page 151, in the records of Washington County, Oklahoma.

The Court further finds that the Defendants, Michael D. Bohannon and Jacqueline Bohannon, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Michael D. Bohannon and Jacqueline Bohannon, are indebted to the Plaintiff in the principal sum of $26,945.00, plus interest at the rate of 11 percent per annum from August 1, 1988 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Washington County, Oklahoma, are in default and have no right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Michael D. Bohannon and Jacqueline Bohannon, in the principal sum of $26,945.00, plus interest at the rate of 11 percent per annum from August 1, 1988 until judgment, plus interest thereafter at the current legal rate of 7.75 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Washington County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Michael D. Bohannon and Jacqueline Bohannon, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

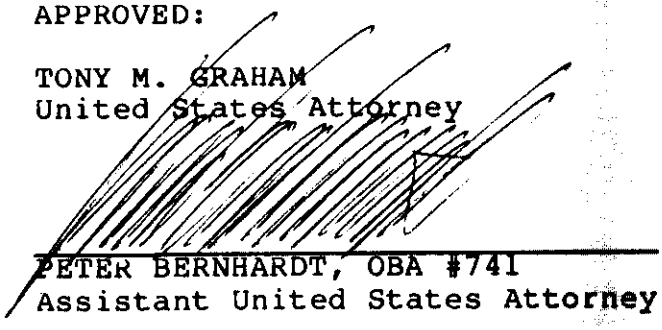
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney

Judgment of Foreclosure
Civil Action No. 89-C-250-E

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HERMAN GIVENS AND LENA GIVENS, Plaintiffs,	)	
vs.	)	No. 88-C-647-C
GENERAL AMERICAN LIFE INSURANCE COMPANY, Defendant.	)	

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-referenced action is hereby dismissed, with prejudice, with each party to bear its own costs.

(Signed) H. Dale Cook

United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED AIR LEASING CORP., Plaintiff,	)	No. 89-C-054-C
vs.	)	
ROSENBALM AVIATION, INC., Defendant.	)	

FILED
AUG 1 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

The parties hereto, having stipulated to the entry of this Order, as evidenced by the signatures of their respective attorneys of record; the Court being informed that the parties have settled this matter;

IT IS HEREBY ORDERED that this lawsuit be dismissed with prejudice and without costs.

DATED this 1st day of August, 1989.

United States District Judge

STIPULATION

The parties hereto through their respective undersigned attorneys, hereby stipulate to entry of this Order.

HALL, ESTILL, HARDWICK, GABLE
GOLDEN & NELSON, P.C.

By: Richard T. McGonigle

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4100 Bank of Oklahoma Tower
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JONES, GIVENS, GOTCHER, BOGAN
& HILBORNE

By: _____
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Michael T. Keester OBA #10869
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HONIGMAN, MILLER, SCHWARTZ & COHN

By: _____
Norman C. Ankers
Of Counsel for Defendant
2290 First National Building
Detroit, MI 48226
(313) 256-7525

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 1 1989

Jack C. Silver, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

ELROY R. FORBES,
580055330

Defendant,

CIVIL NO. 89-C-585 C

CONSENT JUDGMENT

This matter coming on before this Court this 1st day of Aug, 1989, and the Court being informed in the premises and it appearing that the parties have agreed and consent to a judgment as set forth herein; in accordance therewith;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff, United States of America, have and recover judgment against the Defendant, ELROY R. FORBES, in the principal sum of $2312.00, plus pre-judgment interest and administrative costs, if any, as provided by Section 3115 of Title 38, United States Code, together with service of process costs of $11.00. Future costs and interest at the legal rate of 7.75%, will accrue from the entry date of this judgment and continue until this judgment is fully satisfied.

DATED this 1st day of Aug, 1989.

(Signed) H. Dale Cook

By: _____
U.S. DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

HERBERT N. STANDEVEN

District Counsel
Veterans Administration
Counsel for Plaintiff

AGREED By: _____
LISA A. SETTLE, Attorney

AGREED: _____
ELROY R. FORBES

CERTIFICATE OF MAILING

This is to certify that on the ___ day of _____, 1989, a true and correct copy of the foregoing was mailed postage prepaid thereon to: ELROY R. FORBES, 6817 S. Trenton, #1513, Tulsa, OK 74136.

_____
LISA A. SETTLE, VA Attorney